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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 308

IGNATIUS LANZETTA MICHAEL FALCONE AND LOUIE DEL ROSSI, APPELLANTS,

vs.

THE STATE OF NEW JERSEY

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

FILED AUGUST 30, 1938.

SUPREME COURT OF THE UNITED STATES

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INDEX.

	Original	Print
Proceedings in Supreme Court of New Jersey	1	1
Assignments of error	1	1
writ of error	4	2
Record from Court of Quarter Sessions of Cape May County	6	3
Return to writ of error	6	3
Presentation of indictments	8	4
Bill of indictment	9	5
Order re indictments	10	5
Record of trial proceedings	11	6
Motion to quash indictment	16	9
Statement of evidence	26	14
Caption and appearances	26	14
Drawing of jury (omitted in printing)	27	
State's opening (omitted in printing)	48	
Defendants' opening (omitted in printing)	50	

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—8560

Proceedings in Supreme Court of New Jersey—Continued.
Record from Court of Quarter Sessions of Cape May County—Continued.
Statement of evidence—Continued. Original Print

Testimony of Wm. P. Kelly	52	15
Frank Ruggerio	67	24
Albert J. Waldinger	70	26
James P. Ryan	72	27
John J. Creeden	98	39
Harry E. Peltz (omitted in printing)	100	
Francis J. Dunn	105	42
Richard H. Anderson (omitted in printing)	115	
Martin Lyford (omitted in printing)	117	
Charles Steinberg	118	48
John V. Hardy (omitted in printing)	124	
George Muhs	132	52
James Hamilton (omitted in printing)	138	
James W. Tracy, Jr. (omitted in printing)	139	
Frances Harrison (omitted in printing)	140	
Richmond N. Richmond (omitted in printing)	147	
Defendants' motions for directed verdict	151	56
Testimony of Daniel Falcone (omitted in printing)	160	
Thomas Descano (omitted in printing)	169	
Hyman Cohen (omitted in printing)	172	
Edward Hunt (omitted in printing)	184	
Pius Lanzetti (omitted in printing)	185	
Dominic Falcone (omitted in printing)	194	
Thomas Paul (omitted in printing	199	
Thomas Shea (omitted in printing)	208	
Pasquale Lettieri (omitted in printing)	211	
James C. Haines (omitted in printing)	214	
Thomas J. Murphy (omitted in printing)	216	

	Original	Print
Proceedings in Supreme Court of New Jersey—Continued.		
Record from Court of Quarter Sessions of Cape May County—Continued.		
Statement of evidence—Continued.		
Testimony of—Continued.		
Robert Pritsker (omitted in printing)	218	
Bessie Lanzetti (omitted in printing)	223	
Renewal of motion for directed verdict (omitted in printing)	227	
Court's charge to the jury	228	62
Defendants' requests to charge (omitted in printing)	237	
State's request to charge (omitted in printing)	240	
Assignments of error in Court Errors and Appeals	241	67
Writ of error	242	68
Return to writ of error (omitted in printing)	244	
Opinion, Parker, J., Supreme Court	245	69
Proceedings in Court of Errors and Appeals of New Jersey	250	71
Order of affirmance	250	71
Opinion, per curiam	252	72
Petition for appeal (omitted in printing)	253	
Order allowing appeal	257	73
Assignments of error and prayer for reversal	259	73
Citation and service (omitted in printing)	262	
Clerk's certificate (omitted in printing)	265	
Bond on appeal (omitted in printing)	266	
Statement of points to be relied upon and designation as to printing record	268	75

[fol. 1] **IN SUPREME COURT OF NEW JERSEY**

THE STATE, Defendant in Error,

against

FRANK PIUS, Alias IGNATIUS LANZETTA, MICHAEL FALCONE and LOUIS DEL ROSSI, Plaintiffs in Error

ASSIGNMENTS OF ERROR

The above named Frank Pius alias Ignatius Lanzetta, Michael Falcone and Louis Del Rossi, the plaintiffs in error, by their attorney, George R. Greis, say that in the record and proceedings aforesaid and also in giving the judgment aforesaid, there is manifest error against them the said, Frank Pius alias Ignatius Lanzetta, Michael Falcone and Louis Del Rossi, and say that the said judgment should be reversed and hereby assign the following reasons and causes for such reversal.

1. Chapter 155 of the Laws of 1934 for an alleged violation of which plaintiffs in error were indicted, tried and convicted is unconstitutional and void under the provisions of the Constitution of the United States in that it is contrary to one or all of the following provisions of the Constitution, namely, Article IV, Section 2, the Thirteenth Amendment to [fol. 2] the Constitution and the Fourteenth Amendment to the Constitution.

2. That the said suit is in violation of one or all of the following provisions of the Constitution of the State of New Jersey, namely, Article 1, Section 15, Article 1, Section 18, Article IV, Section 7, Paragraph 3, and Article IV, Section 7, Paragraph 4.

3. Because the trial court refused to quash the indictment on motion duly made by counsel.

4. Because the trial court refused to direct a verdict of acquittal on motion duly made by counsel for the plaintiffs in error.

5. Because the verdict was against the weight of evidence.

6. Because the indictment failed to charge the commission or omission of any overt act within the jurisdiction of the trial court and because no crime had been committed.

7. Because the verdict of the jury was contrary to the court's charge to the jury and contrary to the evidence.

8. Because upon the whole record the judgment of conviction is contrary, to law.

[fol. 3] 9. Because the proofs submitted by the State did not prove the allegations of the indictment.

George R. Greis, Attorney for and of Counsel with Plaintiffs in Error.

I have received a copy of the foregoing Assignments of Error this Thirty-First day of March, 1937.

French B. Loveland, Prosecutor of the Pleas of Cape May County.

[fol. 4] IN SUPREME COURT OF NEW JERSEY

WRIT OF ERROR

THE STATE OF NEW JERSEY, ss:

The State of New Jersey to Palmer M. Way, Esq., Judge of the Court of Quarter Sessions of the County of Cape May:

Because in the indictment record of proceedings and also in giving judgment upon the certain indictments against Frank Pious alias Ignatius Lanzetta, Michael Falcone and Louis Del Rossi, upon charges of being enemies of the State and gangsters and with violations of the provisions of the statute which is Chapter 155 Laws of 1934, of the State of New Jersey, in the Borough of Wildwood Crest, County of Cape May and State of New Jersey, which said indictments and the several counts therein were returned to the Court on the thirty-first day of July, 1936, as having been found by the Grand Jury of the County of Cape May, whereof, before you they have been indicted and thereafter were convicted by a certain jury of the County of Cape May, taken between the State of New Jersey and the said Frank Pius alias Ignatius Lanzetta, Michael Falcone and Louis Del Rossi, as it is said, manifest error has intervened to the great damage of the said Frank Pius alias Ignatius Lanzetta, Michael Falcone and Louis Del Rossi, as from their complaint we have received information, we being willing in their behalf, to correct the error in due manner, if any there

shall be, and that speedy justice be done to them, the said Frank Pius alias Ignatius Lanzetta, Michael Falcone and Louis Del Rossi, command you that if judgment be thereon [fol. 5] given, then you distinctly and openly send under your seal the record and proceedings aforesaid with all things touching the same to our Justice of our Supreme Court of the State of New Jersey, on the 12th day of April next, and this writ with the record and proceedings aforesaid being inspected, we may further cause to be done thereupon for correcting that error what of right and according to the laws of New Jersey ought to be done.

Witness, Honorable Thomas J. Brogan, Chief Justice of our Supreme Court at Trenton, New Jersey, this 23rd day of March, one thousand nine hundred and thirty-seven.

Fred L. Bloodgood, Clerk.

George R. Greis, Attorney.

[fol. 6] In Court of Quarter Sessions of Cape May County, April Term, A. D. 1936

Before Palmer M. Way, Judge

The State

vs.

Frank Pius, Alias Frank Lanzetta, Alias Ignatius Lanzetta, Alias Ignatius Lanzetto, Alias Ignatius A. Lanzetti, and Michael Falcone, Alias Mickey Britt, and Louis Del Rossi, Alias Fattie Louie

Indictment for Violation of Gangster Act

French B. Loveland, Prosecutor of the Pleas, for State.
George R. Greis, A. J. Cafeiro, for Defendants.

[fol. 7] Return

The answer of Palmer M. Way, Esquire, President Judge of the Court of Common Pleas of the County of Cape May, holding the Court of Quarter Sessions in and for the said County within named, the record and proceedings of the plaint whereof mention is within made, with all things touching the same, I certify to the Justices of our Supreme

Court of the State of New Jersey, at Trenton, at the day and year within contained, in a certain schedule to this writ annexed, as I am commanded.

Palmer M. Way, Judge.

And I further certify that returned herewith is the record of the entire proceedings at the trial of the said cause.

Palmer M. Way, Judge.

[fol. 8] In Court of Quarter Sessions of Cape May County

Presentation of Indictments

Be it Remembered, that a Court of Oyer and Terminer, holden at Cape May Court House, in and for the said County of Cape May, on the second Tuesday of April in the year of our Lord one thousand nine hundred and thirty-six, before the Honorable Ralph Donges, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, and the Honorable Palmer M. Way, Judge of the Court of Common Pleas, in and for the said County, according to the form of statute in such case made and provided, by the oath of Charles W. Haines, Gilbert Hughes, Raymond Adams, Edmund Glazier, John Castaldi, Frank Biddle, William Moncrief, Edward Kurtz, Ralph Johnson, William Jocher, Irvin Stevens, Harry Nickerson, J. Woodruff Eldredge, Bertrand Hillman, Irvin Loper, John Kaighn, Asa Colson, Mulford Stevens, Clair Faust, Charles Grace, Heath Norbury, Raymond Hall and William Lipman, good and lawful men of the said County of Cape May, duly summoned, and then and there sworn, affirmed and charged to inquire for the State of New Jersey, in and for the body of the said County of Cape May.

It is Presented, in manner and form following, that is to say:

The bills herewith presented are true bills.

Charles W. Haines, Foreman.

Filed July 31, 1936. Stirling W. Cole, Clerk.

[fol. 9] In Court of Quarter Sessions of Cape May County

Indictment

In the Court of Oyer and Terminer of Cape May County, April Term, in the year of our Lord one thousand nine hundred and thirty-six (1936).

Cape May County, to wit:

The grand inquest of the State of New Jersey, and for the body of the County of Cape May, upon their respective oath and affirmation, those who affirmed having first alleged themselves conscientiously scrupulous of taking an oath.

Present that Frank Pius, alias Frank Lanzetta, alias Ignatius Lanzetta, alias Ignatius Lanzetto, alias Ignatius A. Lanzetti, and Michael Falcone, alias Mickey Britt and Louis Del Rossi, alias Fattie Louie, late of the Borough of Wildwood Crest in the said County of Cape May, on the 12th, 16th, 19th and 24th days of July in the year of our Lord one thousand nine hundred and thirty-six (1936) at the Borough of Wildwood Crest in the County of Cape May aforesaid, and within the jurisdiction of this Court, they, and each of them, not being engaged in any lawful occupation; they, and all of them, known to be members of a gang, consisting of two or more persons, and they, and each of them, having been convicted of a crime in the State of Pennsylvania, are hereby declared to be gangsters.

To the evil example of all others in like case offending, contrary to law in such case made and provided, and against [fol. 10] the peace of this State, the government and dignity of the same.

French B. Loveland, Prosecutor of the Pleas.

Filed July 31, 1936. Stirling W. Cole, Clerk.

Which said indictment was to wit, on the Thirty-first day of July in the year of our Lord one thousand nine hundred and thirty-six, at a Court of Quarter Sessions holden at Cape May Court House, in and for the County of Cape May, no Justice of the Supreme Court of the State of New Jersey nor Judge of the Court of Quarter Sessions being present in the Court House, and the Grand Jury being desirous of making a presentment of sundry bills of indictment according to the form of the statute in such case made and pro-

vided, duly delivered here in Court by the Grand Jurors aforesaid, to Stirling W. Cole, Clerk of the County of Cape May, and impounded, pursuant to an order of the Court heretofore made, as here set forth, to wit:

IN COURT OF QUARTER SESSIONS OF CAPE MAY COUNTY

In the Matter of Reception of Indictments of the April Term, 1936

[fol. 11] ORDER RE INDICTMENTS

It is on this 31st day of July, 1936, hereby ordered that Stirling W. Cole, Clerk of the County of Cape May, receive from the above Grand Jury such indictments or presentments as they may make at the conclusion of their scheduled session of July 31st, 1936, and impound said indictments and move in all particulars pursuant to Chapter 239 of the Laws of 1929.

Palmer M. Way, Judge, Cape May County Quarter Sessions.

Entered July 31, 1936. Stirling W. Cole, Clerk.

IN COURT OF QUARTER SESSIONS OF CAPE MAY COUNTY

TRIAL PROCEEDINGS

And afterwards, that is to say on the Thirty-first day of July A. D. nineteen hundred and thirty-six, at the said Court of Quarter Sessions holden before Honorable Palmer M. Way, Judge of Cape May County Court of Common Pleas and Quarter Sessions, said indictments were released from impoundment by order of said Court on motion of French B. Loveland, Prosecutor of the Pleas.

And afterwards, to wit, on the said Thirty-first day of July in the year of our Lord one thousand nine hundred thirty-six, before Palmer M. Way, Esquire, Judge of the Court of Quarter Sessions of the County of Cape May, the defendants, Frank Pius, alis Frank Lanzetta, alias Ignatius Lanzetta, alias Ignatius Lanzetto, alias Ignatius A. [fol. 12] Lanzetti, and Michael Falcone, alias Mickey Britt, and Louis Del Rossi, alias Fattie Louie, were ordered to be

placed at the bar to plead and on being charged by French B. Loveland, Prosecutor of the Pleas, upon this indictment, plead not guilty thereto.

And afterwards, that is to say on the Twelfth day of August A. D. nineteen hundred thirty-six, to which day the trial of the aforesaid indictment was postponed, at the said Court of Quarter Sessions holden before Honorable Palmer M. Way, Judge of Cape May County Court of Quarter Sessions, comes French B. Loveland, Prosecutor of the Pleas, who prosecutes as aforesaid, and the said Frank Pius, alias Frank Lanzetta, alias Ignatius Lanzetta, alias Ignatius Lanzetto, alias Ignatius A. Lanzetti, and Michael Falcone, alias Mickey Britt, and Louis Del Rossi, alias Fattie Louie, being set to the bar withdraw the pleas of not guilty heretofore entered by them to this indictment, for the purpose of making a motion to quash the indictment, and this motion being denied by the Court, the said defendants, Frank Pius, alias Frank Lanzetta, alias Ignatius Lanzetta, alias Ignatius Lanzetto, alias Ignatius A. Lanzetti, and Michael Falcone, alias Mickey Britt, and Louis Del Rossi, alias Fattie Louie, were ordered to be placed at the bar to plead and on being charged by French B. Loveland, upon this indictment, plead not guilty thereto;

And Afterwards, that is to say on the Fourteenth day of September A. D. nineteen hundred thirty-six, to which day the trial of the aforesaid indictment was postponed, at the [fol. 13] said Court of Quarter Sessions holden before Honorable Palmer M. Way, Judge of Cape May County Court of Quarter Sessions, comes French B. Loveland, Prosecutor of the Pleas, who prosecutes as aforesaid, and the Frank Pius, alias Frank Lanzetta, alias Ignatius Lanzetta, alias Ignatius Lanzetto, alias Ignatius A. Lanzetti, and Michael Falcone, alias Mickey Britt, and Louis Del Rossi, alias Fattie Louie, were set to the bar and being ready for trial, the trial of the said indictment was moved by French B. Loveland, Prosecutor of the Pleas, the Sheriff, Paul M. Scull, was then ordered to return a panel of jurors, and the following jurors not being challenged, were duly sworn by the Clerk of the Court:—

Mary Fox, Margaret Davis, J. H. Becotte, William Stockett, Sadie Herbert, Ruth Goslin, Abraham Levy, Frank L. Bennett, Reba Barber, Ellsworth Somers, Walter Sherman, and Edward Schlegel, upon that jury, who to speak the truth of and concerning the premises, and thereupon the trial of

said issue was commenced and continued until the Fifteenth day of September A. D. nineteen hundred thirty-six, when the jury returned into Court in charge of the officers sworn to attend them, and then and there in the presence of Honorable Palmer M. Way, Judge of the Cape May County Court of Quarter Sessions, do say upon their oath, they find the defendants, Frank Pius, alias Frank Lanzetta, alias Ignatius Lanzetta, alias Ignatius Lanzetto, alias Ignatius A. Lanzetti, and Michael Falcone, alias Mickey Britt, and Louis Del Rossi, alias Fattie Louie, guilty in the manner and [fol. 14] form as charged upon this indictment, with a recommendation to Court for mercy, and so say they all.

Afterwards, to wit, on the Twenty-third day of September in the year of our Lord one thousand nine hundred thirty-six, before Honorable Palmer M. Way, Judge of Cape May County Court of Quarter Sessions, at Cape May Court House, cometh the said Frank Pius, alias Frank Lanzetta, alias Ignatius Lanzetta, alias Ignatius Lanzetto, alias Ignatius A. Lanzetti, and Michael Falcone, alias Mickey Britt, and Louis Del Rossi, alias Fattie Louie, and having been set to the bar in their proper person to receive the judgment of the law; French B. Loveland, Prosecutor of the Pleas, then moved for the judgment of the law.

Whereupon, on the said Twenty-third day of September in the year of our Lord one thousand nine hundred and thirty-six, all and singular the premises being seen by the Court here fully understood, it was ordered and adjudged by the Court that the defendants, Frank Pius, alias Frank Lanzetta, alias Ignatius Lanzetta, alias Ignatius Lanzetto, alias Ignatius A. Lanzetti, and Michael Falcone, alias Mickey Britt, and Louis Del Rossi, alias Fattie Louie, each, be imprisoned in the State Prison of this State for not more than a maximum term of ten years and not less than a minimum term of five years, at hard labor, upon this conviction.

[fol. 15] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 16] IN COURT OF QUARTER SESSIONS OF CAPE MAY COUNTY

[Title omitted]

MOTION TO QUASH INDICTMENT

The above entitled Cause came up for Motion Wednesday morning, August 12, A. D. 1936, at ten-thirty A. M., before the Hon. Palmer M. Way, Judge of the Common Pleas Court. French B. Loveland, Esq., Prosecutor of Cape May County, appearing for the State, and George R. Greis, Esq., and A. J. Cafiero appearing for the defendants.

By Mr. Greis: May it please the Court: At this time I would ask the Court's permission to withdraw the pleas of Not Guilty, entered in the indictment against Lanzetta, Falcone and Del Rossi, a joint indictment, for the purpose of making a Motion to quash.

By the Court: For that purpose it may be withdrawn and so stated on the record.

By Mr. Greis: If the Court please: I move to quash the indictment found in this case, for several reasons.

The first reason is that the indictment is insufficient in [fol. 17] particulars, as to any offense, alleged to have been committed, to properly enable the defendants to prepare their separate defenses.

The second reason is, that the indictment sets forth no act alleged to have been committed in controversion of any Statute of the State of New Jersey.

The third reason is, that the indictment fails to charge a crime. Further, that it fails to set forth any date, place or tribunal of an alleged conviction in the State of Pennsylvania: And for these, and other reasons, is vague, uncertain and indefinite.

Also, If the Court please, upon various constitutional grounds, and we believe that the Statute, under which this indictment has been found, is unconstitutional for various reasons, which I will state to the Court.

The first of those reasons is that the particular section of the law, under which the indictment is drawn, does not charge any act, any overt act, of any kind or description. Under the division of crime it is neither an act of omission or commission, either contrary to the statute or contrary to precepts of the early Common Law. But this particular

Statute charges only a status and state of being and condition, or set of conditions, existing, and attempts to make that state of things a crime. Section 4, under which this indictment is drawn, reads: "Any person not engaged in lawful occupation, known to be a member of any gang, con- [fol. 18] sisting of two or more persons, who has been convicted at least three times of being disorderly persons, or who has been convicted of any crimes in this, or any other State, is declared to be a gangster; provided, however, that nothing in this section contained shall in any wise be construed to include any participant or sympathizer in any labor dispute." Also it is an added fact that the first paragraph of this law, any of the first five paragraphs, do not create a crime; they create a status or set of conditions. The first paragraph, that might be considered, states a gangster is hereby declared to be an enemy of the State of New Jersey and then the succeeding paragraphs go on to discuss the state of being, or conditions, as I have said, that create or dominate a person a gangster. But then having been found a gangster the fifth paragraph ends up by saying:

"Any person convicted of being a gangster under the provisions of this act shall be guilty of a high misdemeanor, and shall be punished by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment not exceeding twenty years, or both."

We can see the second reason for unconstitutionality of this particular section of the act, if not all of it, is the 13th Amendment to the United States Constitution, which reads: "Involuntary servitude shall not exist within the United States or any place subject to its jurisdiction." Of course we know that was added to the Constitution for the purpose of stopping slavery: But here is a law which says: "A person not engaged in lawful occupation," with two or three [fol. 19] added condition, or conditions, in the United States, to be committed, but conditions already existing, shall be thus and so and guilty of a high misdemeanor.

The second constitutional ground, or third constitutional ground is, that it violates the 14th Amendment, which provides: "That no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or shall any State deprive any person of life,

liberty or property without due process of law, or deny to any person within the jurisdiction the equal protection of the laws."

The fourth constitutional reason is that it violates Article 1, Section 1, of the Constitution of New Jersey, which provides: "That natural and unalienable rights of enjoying and defending life and liberty, acquiring and possessing and protecting property and pursuing and obtaining safety."

Fifth, that it violates the New Jersey Constitution, Article 1, Section 18, which provides: "That the people have the right freely to assemble together, to consult for the common good." That refers to the particular paragraph of this Section in the Statute, in which these defendants are charged: "Known to be a member of a gang consisting of two or more persons."

Six, that it violates Article 4, Section 7, Paragraph 3, which provides: "The Legislature shall not pass any bill of attainder or ex post facto law."

[fol. 20] Seven, that it violates Article 4, Section 7, paragraph 4, which provides: "That every law shall embrace but one object, and that shall be expressed in the title, &c."

If the Court Please: Those are the general statements of the reasons for asking that the indictment be quashed.

(Argument follows).

By the Court: Do you have anything you want to say, Mr. Cafeiro?

By Mr. Cafeiro: Not at this time, if the Court please, I may decide to say something after the Prosecutor is through replying.

By the Prosecutor: If the Court please: The State asks that the Motion be dismissed, directed to quash the indictments.

One of the points in question was that the act was ex post facto. It is not ex post facto unless all these circumstances do not arise. First we have got unlawful occupation, members of a gang, convicted three times of being disorderly or one convicted of crime and that is the conditions of the arguments today, if the Court please.

As to the phrase saying that the Act on the part of the Legislature of the State of New Jersey is unconstitutional. In the immediate past, after the elimination of the Volstead [fol. 21] Act, when rackets ceased to be able to secure their means by that uniawful occupation, then there rose up in our

country a kidnapping epidemic. The State was unable to cope with the situation so Congress took notice of the situation and passed what is known as the famous Lindbergh Case or law and when those, who were participating in that obnoxious situation, were apprehended they then granted an amendment and it is now in our constitution of the Country, and in this State, and does not violate any of the rights of the constitution. The Constitution, as found in the State of New Jersey, and through its Legislature, has deemed it advisable to pass an act, which attempts to, and I think does, control this situation, with reference to the evils to be confronted. That is what the State of New Jersey has done. They saw a state existing, which is obnoxious to Society, and has passed an act dealing with that situation. The word Gangster has never been interpreted by any of the Courts of the State of New Jersey to date, so that the only thing to do is take the proper meaning as applied to all gangs. It describes a body of men associated together for matters entirely proper, labor and things of that sort, but gangs of men have improper purposes; take page 34, the word gangster, where it is used in a sinister sense. The Court of Errors has said that the purpose of this legislature is to check evils in dealing with the act, which is acknowledged to this. The purpose is to check evils in the beginning and thus result in proper safety.

If the Court please: This is not the first time this act has [fol. 22] been attacked from constitutionality, there having been two other cases in the State of New Jersey; one in our neighboring County, Gloucester County, at which time a motion attacking the constitutionality of this indictment was made and the same argument offered today was presented at that time. The Court in that County ruled and there was a conviction in that case. The only other case was in Passaic County and there was no appeal from that case.

By Mr. Greis: The case just referred to was under a section other than the one we are working on.

By the Prosecutor: Section 2 and Section 4 both, and there were convictions on both sections.

By the Court: Both sections?

By the Prosecutor: Yes. So if the Court please: Under all the attacks as to the constitutionality, I might say the Court has a precedent in the matter and although it is not a higher court, it is a court of record, and this matter has been passed on, and it can be an authority, and that is the

only case that has been adjudicated in the State. So the State asks that the motion be dismissed. The State also asks that date be fixed for trial.

By Mr. Cafiero: The Prosecutor has not met the issue [fol. 23] presented by my associate and I would limit myself to the things and matters, which he has mentioned, and I take it those matters, which have been in controvert, with exception of a frank denial, stand without controversion. None of the arguments, which was raised as to Ex Post Facto, the Prosecutor stated there was the conditions. We submit the only matter, which is before the Court, at the present time, is the indictment. The indictment does not recite when that crime was alleged to be committed in the State of Pennsylvania. Besides the indictment being before the Court; the act, under which that said indictment is found, is likewise before the Court and that was approved in May, 1934. We are not required to meet any other issue, except those mentioned in the indictment, and it doesn't state when in Pennsylvania and we say it is insufficient and it would be difficult in the following of the charge and of any tribunal, which may have passed upon the validity in this section; the matter, of course, is unreported. We have no means of getting the records of the arguments having been advanced and I do respectfully state Your Honor is not bound by any other argument before the Courts but the argument raised today and this particular indictment today. We contain it is defective on one further ground. It sets forth the dates of the 12th, and the 19th of July as the dates of the charge, when these people were not engaged in lawful occupation. If there is any reference to the calendar it will indicate those days are Sundays and as I know the law in our State as to working on Sunday, I don't see how anyone could possibly be charged with a crime. The law says [fol. 24] you should not work on Sunday and under this indictment it is a crime if you do and a crime if you don't. We maintain it is defective and does not sufficiently appraise us of the matters at all. I will not take more time to repeat the matters presented by Mr. Greis.

By Mr. Greis: The case referred to is 31 New York supplemental, 926.

By the Court: I can't feel I am sufficiently impressed by the proponents of the motion to grant it. I think, without any further statement, that I shall deny the motion.

By Mr. Cafiero: Allow an exception?
By the Court: Granted.

(Argument follows as to date for trial and September 14th, A. D. 1936 is set as the date of trial.)

By Mr. Greis: I would like to have the plea entered again, the plea that was withdrawn.

(All plead not guilty.)

By the Court: Not guilty on behalf of all the indictments, and all three defendants, as now presented. They are familiar with the indictment in that they have already entered a plea of not guilty by counsel; and counsel, both coun-
[fol. 25] sel, consent to that, and the defendants consent to that being entered on the record? (Affirmative.)

Palmer M. Way, Judge.

After having been sworn in as stenographer the notes, and the transcribing of said notes, are a true copy of the above entitled motions, taken to the best of my ability.

Blanche Bonnell, Stenographer.

[fol. 26] COURT OF OYER AND TERMINER, CAPE MAY COUNTY

STATE OF NEW JERSEY

versus

FRANK PIUS, Alias FRANK LANZETTA, Alias IGNATIUS LANZETTA, Alias Ignatius Lanzetto, Alias Ignatus A. Lanzetti, and Michael Falcone, Alias Mickey Britt, and Louis Del Rossi, Alias Fattie Louie, Defendants

Before Hon. Palmer M. Way, J., and a Jury

Statement of Evidence

Cape May Court House, N. J.,
Monday, September 14, 1936.

APPEARANCES

French Loveland, Esq., Prosecutor of the Pleas, and Herbert Campbell Esq., Assistant Prosecutor, for the State.

[fols. 27-51] Geore Greis, Esq., A. J. Cafeiro, Esq., and Samuel Kagle, Esq. (Philadelphia), for the Defendants.

[fol. 52] Sergeant William P. Kelly, called as a witness on behalf of the State, being sworn, testified as follows:

Direct examination.

By Mr. Loveland:

Q. Sergeant Kelly, where do you live?
A. In Hammonton, New Jersey.
Q. And what is your occupation?
A. Sergeant of State Police.
[fol. 53] Q. Now, Sergeant, I ask you whether you recall your whereabouts on Friday, July 24th, of this year, about five o'clock in the afternoon?
A. I do.
Q. Where were you?
A. I was in Troop A Headquarters, in the Jersey State Police in Hammonton.
Q. And did you leave there shortly thereafter?
A. I did.
Q. And where did you start to?
A. About five P. M. on July 24th, Captain Ryan, in company with Sergeant Peltz, Detective Wallace, McClure and Steinberg——

Mr. Greis: That is objected to as not responsive.
The Court: Not responsive. Restate the question and strike out the answer.

(The question was read by the stenographer as follows: ("And where did you start to?")

A. Started to go to Wildwood Crest.
Q. And who accompanied you, Sergeant?
A. Captain Ryan, Sergeant Peltz, Detective Wallace, McClure and Steinberg, and also Detective Ruggerio of our Department.
Q. And I ask you whether you arrived at Wildwood Crest?
A. We did.
Q. About what time?
[fol. 54] A. About six P. M.

Q. After you arrived at Wildwood Crest, where did you go?

A. We went in the vicinity of Crocus Road, Wildwood Crest.

Q. Will you please go ahead and describe what you did?

A. We cruised in the vicinity of Crocus Road and Jersey Avenue. Upon arriving at Wildwood Crest we were joined by Captain Creeden. Captain Creeden got in the car with me, Detective McClure and Wallace, Captain Ryan and Detective Ruggerio in company with Sergeant Peltz and Steinberg in the other car. While cruising in the vicinity of Crocus Road and Jersey Avenue, we observed Ignatius Lanzetti in company with Mickey Britt walking on New Jersey Avenue between Astor and Cardinal Avenue, walking in the direction of Crocus Road. We were later joined by Captain Ryan and notified him of what we had seen. He advised that we should continue to cruise in that vicinity in an attempt to learn who was living on Crocus Road. While watching 107 Crocus Road we observed, about eight-thirty P. M., we observed Mickey Britt come out of 107 Crocus Road, and about the same time he came out of the house or within a minute or so, Captain Ryan drove up in his car and they started to get out of his car, and Mickey Britt walked on Crocus Road towards New Jersey Avenue, and apparently looked over his shoulder and saw these men entering 107, and he ran across the street.

Mr. Greis: Just a minute, please. This witness is testify-
[fol. 55] ing to what other people saw. I object to it and ask it be stricken from the record, and ask the witness be cautioned in telling this story to tell what he knows of his own knowledge and what he saw himself.

The Court: Yes, you must be careful of your statements in that respect. Counsel for the defense is right. You will confine your narrative statements as to what you saw and not what somebody else might have seen.

The Witness: Yes, sir.

The Court: Proceed.

The Witness: We observed the car containing Captain Ryan——

Mr. Greis: If the Court please, I object to the statement "we". This witness is testifying not for the party but for himself.

The Court: That is quite right. Confine your remarks to what you have seen yourself.

The Witness: I observed the car containing Ryan stop in front of the premises of 107 Crocus Road about two minutes after the defendant Mickey Britt had walked out of the premises. Mickey Britt walked on Crocus Road towards New Jersey Avenue, or Jersey Avenue. While walking towards Jersey Avenue he looked over his shoulder, turned his head and looked back towards Crocus Road and then [fol. 56] he darted across the street behind a Pontiac sedan which was parked there, which had a Delaware registration on, containing a woman. He crouched down behind this car while Captain Ryan and other detectives entered 107 Crocus Road. At that time we drove up in back of the car and arrested Mickey Britt.

Q. And then did you go in this house, 107 Crocus Road?

A. We left the defendant Mickey Britt in our car in company with Detective McClure and we entered the premises 107 Crocus Road and found Captain Ryan had then Del Rossi and Ignatius Lanzetti under arrest in that house.

Q. And then I ask you did you search the house?

A. The house had been searched before I arrived in there.

Q. Now, after that where did you take the three defendants?

A. First took the three defendants to the Wildwood Crest police headquarters.

Q. And from there where did you take them?

A. Took them to our sub-station located here in Cape May Court House.

Q. And I ask you what conversations took place between you and these defendants at the Troopers' headquarters here at Cape May Court House.

A. They brought the three defendants into the office—rather, I did, in company with others—and sat them on a sort of a porch swing and proceeded to ask routine ques- [fol. 57] tions of them, for my arrest report. I asked Mr. Lanzetti his correct name. He told me his name was Ignatius Andrew Lanzetti. He told me that he was thirty-three years old.

Mr. Greis: This is objected to, if the Court please, until it be shown that the defendants were advised, if they were advised, that statements made might be used against them.

Mr. Loveland: If the Court please, this is not a confession. This is just conversation that took place between these defendants and this police officer.

Mr. Greis: The defendants were under arrest, if the Court please, according to the testimony, and unless its competency be shown and that it be shown definitely that they were told that these statements were to be used against them, it is not proper testimony in this case.

The Court: I will hear you, Mr. Prosecutor.

Mr. Loveland: If the Court please, here is the situation. Here you have a police officer entering into a conversation with these defendants and there is not any efforts or no intentions on the part of the State to prove this was in any wise a confession. This was a statement made at the time of the arrest and after they were arrested and by all the rules of evidence as I know them this is certainly admissible. If that were not true, then no statement that could [fol. 58] be made by any defendant at any time in circumstances such as these—there would never be any result. Now, in the case of their asking for a signed confession—but that is not our situation. This is a conversation taking place between these defendants—and it certainly is admissible.

The Court: And you think it is a voluntary conversation that is now being talked about.

Mr. Greis: Might I suggest, if the Court please, that no statement is voluntary when a defendant is under arrest. In other words, voluntary statements mean statements made before arrest or made to some person voluntarily when there is no thought of action for court or what not. A confession, on the other hand, is one—statement which is made after the defendant is perhaps under arrest and with the definite idea that it is to be used in court against him. Here we don't have either—neither the voluntary statement, because they are under arrest, they are under compulsion, they are brought here against their will to the State Police barracks at Cape May Court House from their place in Wildwood and they say certain things. I say that they are not admissible under those conditions unless they are told that the statements are to be used against them, or unless they were made in some voluntary manner prior to the arrest. It certainly is apparent that it was the inten-

tion to use these statements because they are now being produced the first thing, the first witness in the case.

Mr. Loveland: If the Court please, that is just a deduc-
[fol. 59] tion being drawn. The practical application in this manner is that if it is impossible for witnesses to state the conversation which took place between the defendants, the practical results are that not a conviction out of a thousand would be possible to obtain. These defendants were under arrest and in the usual procedure of the police they question all defendants and make a report therefrom. And this is what is happening in this case. It is part of the res—it is part of this—it is part, an integral part, of this present case.

The Court: Were these defendants that now appear here, were they under oath at the time of this discussion or was it just a conversation?

The Witness: Just a conversation, sir, conversation of routine——

The Court: Do I understand that no hearing had been opened?

The Witness: No, sir.

The Court: I will allow the question to be asked.

Mr. Greis: Your Honor will allow me an exception.

The Court: Granted.

Palmer M. Way, Judge.

[fol. 60] Q. Proceed, Sergeant, and tell us the conversation between you and these defendants at the State Police headquarters at this time.

A. I first asked Lanzetti what his full name was, and he told me Ignatius Andrew Lanzetti. I asked him how old he was and he told me he was thirty-three years of age. I asked him where he was born; he told me City of Philadelphia. I asked him where his home was, and he told me on some number on Pine Street in the City of Philadelphia. I asked him what his occupation was and he said he was a machine fixer. I asked him how long it was since he was employed and he said he had not been employed in over five years.

I next asked Falcone what his full name was, and he said Michael Falcone. I asked him what nicknames he used or aliases he had, and he told me Mickey Britt. I asked him where he was born; he informed me he was born in the City

of Philadelphia. I asked him how old he was, and he told me he was thirty-five years of age. I asked him what his occupation was and he told me he was a bricklayer. I asked him how long it was since he was employed; he said he had not been employed since he got out of prison four or five years ago.

I asked Mr. Del Rossi what his name was, and he told me Louis Del Rossi. I asked him where he lived; he told me he lived on some number on Carleton Street, the City of Philadelphia. I also asked him where he was born; he told me Philadelphia. I asked him how old he was. He told me he was thirty-two years of age. I asked him what his occupation was, and he told me he was a chauffeur. I asked [fol. 61] him how long it had been since he was employed, and he says he had not been employed in over two years.

Q. And then I ask you whether on the next day, on the following day, on July 25th, you had any further conversation with these defendants?

A. On the 25th, in company with Detective Ruggerio and Corporal Waldinger, we went to the County Jail to take these men to be arraigned, brought them out of the row of cells into the corridor, and Detective Ruggerio at this time held a conversation with them as to when they were last employed, and as to that subject they answered as they had to mé the night before.

I also asked Ignatius when he had come to Wildwood Crest. He told me he had come down here about June 22nd. I asked Del Rossi when he had come down here, and he told me he came down with Ignatius. I asked Mickey Britt when he come down, and he said he had been down here since the previous Sunday. His words were he had been down since last Sunday. While in the jail corridor Detective Ruggerio asked—also asked the same questions, about when they had come down here, and when Ruggerio asked Mickey Britt he said he was down on several occasions.

Q. Prior to this particular time that he was mentioning?

A. That was his answer, that he was down here on several occasions, several times.

Q. Now asking you whether on that same day you heard any further conversation as to whether they had been convicted or not.

[fol. 62] A. We arraigned the three defendants——

Mr. Greis: Now, I object to that. That is one of the material points to this charge. And I don't think the con-

versation is material because there is a best evidence rule. And that can be proven, and it should be admitted——

Mr. Loveland: I will withdraw the question.

The Court: I think that is the correct thing to do. The question is withdrawn. You need not answer it.

Mr. Loveland: Cross-examine.

Cross-examination.

By Mr. Greis:

Q. Sergeant, it was on the 24th that you went to Wildwood, was it?

A. 24th of July, yes, sir.

Q. Of July or June?

A. July.

Q. July. And had you seen or observed any of these three defendants prior to that day, prior to your arrival in Wildwood Crest that afternoon?

A. I had never seen any of the defendants prior to that date.

Q. And were any of the defendants in your presence that day at any time when you saw them engaged in any unlaw- [fol. 63] ful act of any kind? In other words, were they doing anything?

A. Mickey Britt and Ignatius Lanzetti were walking down the street, walking down the pavement on Jersey Avenue.

Q. Is that an unlawful act, to the best of your knowledge?

A. No, sir.

Q. Were they engaged in any unlawful act or doing anything unlawful in your sight during that day?

A. Yes, I considered that they were.

Q. What?

A. Violating the gangster act.

Mr. Greis: I ask that be stricken out as a conclusion, if the Court please. I asked for acts.

Mr. Loveland: If the Court please, he asked for it.

The Court: Wouldn't any answer to your question be a conclusion?

Mr. Greis: No, sir.

The Court: Why not? Nobody is guilty until proven to be so.

Mr. Greis: This defendant is testifying they were violating this law.

The Court: You asked for it and he has answered.
[fol. 64] Mr. Greis: I asked what act he was doing.
The Court: It may be I misunderstand the question. Repeat the question.

(The testimony was read by the stenographer as follows:

"Q. Were they engaged in any unlawful act or doing anything unlawful in your sight during that day?
A. Yes, I considered that they were.
Q. What?
A. Violating the gangster act.")

The Court: Allow the question to stand and answer.
Mr. Greis: Your Honor will allow me an exception?
The Court: You may have it.

Palmer M. Way, Judge.

Q. Did you see Lanzetti's family when you went in the house?
A. Yes, sir. I saw a woman in there that I was informed was Lanzetti's wife.
Q. Did you take part in the search of the house that you testified about?
A. No, sir, I did not search the house.
Q. No. Now you testified, and the Court has allowed the [fol. 65] question to stand, that they were violating the gangster act. Upon what do you base that information? Where did you get your information that that was being done?
A. I have known the Lanzetti's for several years.
Q. I asked where you got your information. You can answer the question.
A. From the Philadelphia Detective Bureau.
Q. Somebody told you, did they?
A. What are you referring to when you say did somebody tell me what.
Q. What is a violation of the gangster act?
A. Well, the paragraph which the defendants are indicted under, I think there is three or four different counts that comprise that specific violation.
Q. Right. Did you know at the time you went to Wildwood that these men had no lawful occupation?
A. No, sir, I did not.
Q. Did you know they were members of a gang?
A. I had reason to believe that, yes, sir.

Q. But you didn't know it, did you?

A. Not of my own knowledge.

Q. Of your own knowledge. That is two of the things, then, in the law, that you didn't know existed, but still you say they were violating the law; is that correct.

A. Yes, sir.

Q. And had you ever examined the record to find [fol. 66] out whether these men have been convicted of crime in the State of Pennsylvania?

A. I never examined any records.

Q. No. In other words, you didn't know any of the three things in the law that made them guilty of them, did you.

A. I knew of them, yes, sir.

Q. You knew of them through somebody's say so, did you?

A. Yes, sir.

Q. And you didn't know any of your own knowledge?

A. Not——

Q. Yes or no?

A. No.

Q. And still you have sworn under your oath that they were guilty under this act; is that right?

A. That is what I arrested them for, for violation of this act.

Q. You didn't have any warrant at the time you made these arrests, did you?

A. No, Sir.

Q. Defendants came over with you voluntarily?

A. Yes, sir.

Q. When did you tell the defendants what they were being held for, if at all?

A. When we arraigned them before the Justice of the Peace.

Q. That was how long afterwards?

A. How long?

Q. Yes.

[fol. 67] A. They were arrested about eight-thirty P. M. on the 24th, and they were arraigned about one P. M. on the 25th.

Q. In other words, about eighteen hours afterwards, is that right?

A. Probably about eighteen hours, yes, sir.

Q. And the conversation that you have testified about with the defendants at the Police Headquarters was on the same day that they were arrested, was it not?

A. In the evening of the day they were arrested, yes sir.

Q. In other words, the day they answered the questions that you have put into the record in your testimony, they didn't know what they were being held for, is that right? Didn't know until the next day?

A. That is correct.

Q. They gave you their correct names, so far as you know?

A. As far as I know, yes, sir.

Mr. Greis: That is all.

Mr. Loveland: All right, Sergeant.

Detective Frank Ruggerio, called as a witness on behalf of the State, being sworn, testified as follows:

Direct examination.

By Mr. Loveland:

Q. Ruggerio, where do you live?

[fol. 68] A. I live in Vineland, but I am working out of Hammonton, New Jersey.

Q. What is your position?

A. Detective of the State Police of New Jersey.

Q. Detective of the State Police. Now, do you recall the Friday, July 24th, of going from Hammonton to Wildwood Crest?

A. I do.

Q. Will you please tell us what you did on that day?

A. On Friday, July 24th, I accompanied Sergeant Detective Kelly from Hammonton to Wildwood Crest. Upon arrival at Wildwood Crest I shifted over in the car containing Captain James Ryan and Detective Sergeant Harry Peltz and Detective Steinberg, and we made a cruise of the vicinity of Crocus Road and Jersey Avenue, Wildwood Crest. About eight-thirty * * * prior to that time we had met Captain Creeden and Sergeant Detective Kelly, who advised us——

Mr. Greis: Just a moment.

Q. Not what they said.

A. About eight-thirty I had seen Louis Del Rossi on the porch of 107 Crocus Road talking to a person who we

later found out was Ignatius. We cruised around the corner, came back, on Jersey Avenue south of Crocus Road, we picked the defendant Louis Del Rossi and his wife. The question was put to him, "Where do you live", and he says, "Right around the corner." Asked him who was [fol. 69] there. He said just Ignatius. So we went to the bungalow of 107 Crocus Road and we proceeded to search the bungalow for weapons and drugs.

Q. And did you find any?

A. No, sir.

Q. And then where did you go?

A. Why, we waited until Sergeant Detective Kelly came, when they were placed under arrest, and went to Wildwood Crest in the Police Department there, and from there went to the barracks here in Cape May Court House.

Q. Were you present when Sergeant Kelly was talking to the defendants?

A. Yes, sir.

Q. And will you tell us what conversation took place then?

A. I was present when Louis Del Rossi was being questioned as to his correct name, where he resided, and his occupation. When Mickey Britt and Ignatius were questioned I was in the room, but I didn't hear the conversation.

Q. I see. You did hear the conversation between Del Rossi and Kelly?

A. Yes, sir.

Q. Will you tell us what that was?

A. Why, he asked his name. His name was given as Louis Del Rossi. He lived on Carleton Street in Philadelphia. His occupation he gave as a chauffeur. And how old he was.

Q. Then I ask you if you were present the following day in the County Jail and were present at a conversation that took place between these defendants and Kelly?

[fol. 70] A. I was the one that questioned the three defendants.

Q. Oh, you were.

A. Yes.

Q. Tell us what was said and what was answered.

A. Why, I asked Ignatius Lanzetti when was the last time he was employed. He said he hasn't been employed for the last five years or more. Then asked Louis Del Rossi when he was employed, and he said it has been over two years. And I asked Mickey Britt the same question,

and he said he has not been employed since he came out of jail.

Mr. Loveland: Cross-examine.
Mr. Greis: No questions.

Corporal Albert J. Waldinger, called as a witness on behalf of the State, being sworn, testified as follows:

Direct examination.

By Mr. Loveland:

Q. Corporal, where do you live?
A. Cape May Court House.
Q. Are you in charge of the barracks here?
A. Yes, sir.
Q. Directing your attention to July 25th, I ask you [fol. 71] whether you were present with Sergeant Kelly and Ruggerio in the County Jail?
A. I was.
Q. When the defendants were questioned?
A. I was.
Q. Do you recall hearing the conversation?
A. I do.
Q. Will you repeat it?
A. Detective Ruggerio was talking to these three defendants. And he asked Del Rossi how long it has been since he has been employed, and he said it was over two years; and Lanzetti and Micky Britt he asked the same questions, and they both said it was a period of about five years. And he also asked their occupations. Lanzetti said he was a machine fixer. Del Rossi said he was a chauffeur. And Mickey Britt said he was a bricklayer by occupation.

Mr. Loveland: Cross-examine.

Cross-examination.

By Mr. Greis:

Q. Was Mickey Britt asked any questions about formerly being a boxer?
A. Not to my knowledge, no, sir.
Q. You knew he was, didn't you?

A. I heard rumors of it and remarks, but I didn't know definitely.

Mr. Greis: That is all.
[fol. 72] Mr. Loveland: That is all.

Captain James P. Ryan, called as a witness on behalf of the State, being sworn, testified as follows:

Direct examination.

By Mr. Loveland:

Q. Mr. Ryan, where do you live?
A. 410 South 15th Street, Philadelphia.
Q. City of Philadelphia. What is your occupation?
A. Captain of Detectives in the City of Philadelphia.
Q. How long have you been a member of the Department?
A. Nineteen years.
Q. Do you know these three defendants?
A. I do.
Q. On Friday, July 24th, I ask you, Captain, whether you came to Wildwood Crest?
A. I did.
Q. And what did you do after you got there?
A. On—we received a letter on July 24th about four men we wanted in Philadelphia for a series of crimes. The letter give us a description and location——

Mr. Greis: Now, if the Court please, I object to that.
[fol. 73] The Court: Objection sustained.
Mr. Greis: I ask it be stricken from the record.
The Court: Yes, the part that is not responsive.

Q. What did you do this evening you got down to Wildwood Crest, Captain?
A. Well, we met—we met Ruggerio and Kelly in Hammonton and proceeded to Wildwood Crest, where we were met by Captain Creeden. And riding in Wildwood Crest, why, we noticed Louis Del Rossi walking along with his wife, and stepped out and put him in the car and left his wife go, and said, "Where do you live at?" He said, "Over here, 107 Crocus Road." Whom do you live with?" He said, "Ignatius Lanzetti." I said, "Who is there in the

house with him?" He said, "His wife and kid", he says, "and Mickey Britt". So I taken him and put him in the car. We ride around the block, and drive around in front of the house. We got out, that is, Detective Peltz, Steinberg and Ruggerio and I step into the house, and take Ignatius—he is sitting reading a book—we take him upstairs and search the house. And during the course of the conversation I said to Ignatius, I said, "Where is the guns at?" He said, "You know I don't keep any of them things around where my family is." And at that time Kelly had—Kelly and McClure from our Department had Mickey Britt said that they caught them sneaking around an automobile.

[fol. 74] Mr. Greis: That is objected to, "they said".

The Court: Yes, it will be stricken.

Q. Not what they said.

A. So they said, "Well, we will take them in."

Q. Captain, do you know of a gang called the Lanzetti gang?

A. I certainly do.

Q. How long have you known it?

A. I have known the family practically all my life.

Q. Will you name some of the members of the gang?

Mr. Greis: Now, just a moment. If the court please, I object to this question until the proper foundation be laid. In other words, it seems to me necessary for more proof of the existence of the gang than has been offered, before we start with any members of it.

The Court: Why, Mr. Greis? The statute has been very free in the use of the word, apparently.

Mr. Greis: It seems to me that the statute has been not free.

The Court: Depends on the point of view.

[fol. 75] Mr. Greis: Exactly. But it has merely used the word.

The Court: All right.

Mr. Greis: Now, if we are to go by the definition that the cases have given the word, or that Webster's might give it, it seems to me we have a lot of things. And the statute has laid down no definition.

The Court: Now, in order to get down to the point——

Mr. Greis: Yes, sir.

The Court: —is it your thought that in laying this foundation, that there ought to be some testimony as to these men being in company with other men to the knowledge of the witnesses for a period of time and then let the jury determine as to whether a gang is formed or not? Or as to what is your objection? I want to see what you are getting at.

Mr. Greis: My objection is this. I don't know, and I don't think the Court can properly say, what the statute means by "gang", so that I think it is necessary for the Prosecutor to show a series of facts, whether it be congregating, or whether it be a man working on the section on the railroad that we used to know as a section gang, or whether it be the song, "That Old Gang of Mine"—what he means by "gang". In other words, a certain specific set of facts that [fol. 76] create what the Court can define as a gang.

The Court: It seems to me, as the word "gang" is used, that the Prosecution, in order to make the situation clear, may or may not lead up to what we might all understand as a definition of "gang", but if he doesn't see fit to, the jury is the body in this trial that determines facts. Under our peculiar position—I call it peculiar because I think it is, when that word "gang" is used, perhaps put it that way—for the jury to determine as to whether from the testimony there is a gang as indicated in the statute.

Mr. Greis: The substance of my objection is just this: that I object to the form of the question and the proof and the question that the Prosecutor asks in that he asks, "Are they members of a gang"? In other words, I want him to show, that is, to say what constitutes a gang.

The Court: Well, isn't that a proper question, because it calls for his knowledge, and his knowledge can be gone into and supplemented by the Prosecutor, or you have the privilege of cross-examination, to bring out his knowledge as to whether he may or may not know.

Mr. Greis: It calls for a conclusion, and I object to it upon that ground.

The Court: Anything further to say?

[fol. 77] Mr. Loveland: If the Court please, that is how we go about to prove this thing—whether I go all around and bring it in, or whether I ask a question direct,—the matter counsel is discussing is a matter for cross-examination if he wants to test this man's knowledge of what he thinks a gang is.

The Court: Do you want this question to stand?
Mr. Loveland: Yes, your Honor.
The Court: I think it is a proper question, and we w
allow it.
Mr. Greis: Your Honor will allow me an exception?
The Court: It will be granted.

(To which ruling the defendants, by their counsel, pray
bill of exceptions, which is hereby allowed and sealed a
cordingly.-

Palmer M. Way, P. J. (Seal

The Court: Now, then, at this time we will recess for o
hour. We will be back at one-thirty. In the meantim
ladies and gentlemen of the jury, you will be in charge of th
officers, and they have instructions as to how to care fo
you during the noon hour. And everybody remain seate
until the jury has been taken from the room by the officer
[fol. 78] (Recess taken until one-thirty o'clock P. M.)

After Recess, 1:30 o'clock P. M.

Captain James P. Ryan resumed the stand.

Direct examination (continued).

By Mr. Loveland:

Mr. Loveland: Please read the last question.

(The question was read by the stenographer as follows
"Q. Will you name some of the members of the gang?")

Q. Go ahead, Captain.
A. The best way I could do that, your Honor, is to produc
records of arrest of associates of these different member
here.

Mr. Greis: That is objected to.
The Court: Objection sustained.

Q. Captain, I wish you would go ahead from your own
knowledge and tell us the members of the gang that you
know.

Mr. Gries: If the Court please, I ask that this be fixed
within the time charged in the indictment. I object to the
[fol. 79] testimony that goes outside of that.

The Court: Now, let me see what the force of your objection is here, Mr. Greis. You mean to state that to confine the proposition of the gang that existed at the date of the arrest.

Mr. Greis: Yes. And my authority for that is the case that the Prosecutor has cited in connection with this case a number of times, Levine against State, in which Justice Heher said:

"Of course, to justify a conviction in a case of this character, the proof must establish that status at the time of the defendant's apprehension."

The Court: What was the question?

(The question was read by the stenographer as follows: "Q. Will you name some of the members of the gang?")

The Court: You may answer that—members of the gang that were existing at the time of the arrest.

Mr. Greis: My request was that the time be fixed.

The Court: I fixed it. As of the time of the arrest.

[fol. 80] A. Why, five brothers, Pius, William, Lucien and Teo Lanzetti.

Mr. Greis: I object further that there are names now being brought in which are not served on us in the bill of particulars, and I ask that the prosecution be confined to the names that were given us in the bill of particulars on that particular question, and for that purpose ask that the names of Lucien and Teo be stricken from the record.

The Court: Just a moment until I see what has happened in the questions and the answers, in the request for bill of particulars and reply.

Mr. Loveland: We are willing to confine ourselves to those which we submitted to the defense. If he has mentioned names that were not in the list which we furnished, why, we consent that they be stricken.

The Court: Of course those names will be stricken, but I am not familiar, of course, with the bill of particulars and the answers. For me to sit here and attempt to limit anything without any knowledge of what has taken place, I cannot very well do it.

Those two names will be stricken that you objected to, because it is quite apparent they were not included in the answers.

Mr. Greis: That is right.

[fol. 81] The Court: Proceed.

The Witness: John Amato. Edward Di Alanzo, alias Cowboy.

Mr. Greis: That name was not in the list, if the Court please. I object to it and ask it be stricken.

The Court: That will be stricken.

Mr. Greis: Now, if the Court please, I think it is prejudicial to these defendants that this naming of persons not in here continue.

The Court: Well, now, how are we going to arrange it? This man is stating that he knows the members of this gang. He has given testimony in connection with it. He probably doesn't know anything about the bill of particulars, either. But the State is bound by what they give you, and let the issue run with that information.

Mr. Greis: I understand the situation.

The Court: Now, if you and the Prosecutor can straighten matters out, I will be glad for you to confer. If not, it will have to run; that is the only way of handling it.

Mr. Loveland: That is, if counsel feels it it desirable that I do it in another way, I will take the bill of particulars and ask him in particular each one. I am willing to do that.

[fol. 82] Mr. Greis: I won't make any further objection.

The Court: All right.

Mr. Greis: Except that I will ask that they be stricken.

The Court: All right. Proceed. Give your names and Mr. Greis will check.

The Witness: George Myers.

Mr. Greis: I ask that be stricken.

Mr. Loveland: I am trying to get the original.

The Court: Do you want to wait for it?

Mr. Loveland: Yes, I have sent for the original.

Q. You may proceed.

The Court: No; there is an objection to this last name. What was it?

The Witness: George Myers.

Mr. Loveland: We consent to that.

The Court: All right.

Q. You may proceed, Captain.

A. Mikey Mateo.

Mr. Greis: That name is not in the list, if the Court please. I ask it be stricken.

[fol. 83] Mr. Loveland: All right.

The Witness: Albert Salvatore Mateo.

Mr. Greis: That is objected to, and I ask it be stricken.

The Court: That is, this last one.

Mr. Greis: Yes.

The Court: Let me hear, Mr. Prosecutor, if you are consenting.

Mr. Loveland: I am consenting.

The Court: Please respond each time.

Mr. Loveland: All right.

Q. Proceed.

The Witness: Your Honor, I have all these names on these records. Of course, going over these names right now, it is going to take time. The reason why I associate these names, we have the connection with each of these here names with the rest of these people mentioned here.

Mr. Greis: Now, if the Court please, if that is the basis upon which this witness is testifying, I ask all of his testimony be stricken.

[fol. 84] The Court: No, he is apparently testifying from his memory so far.

Mr. Greis: He said he was testifying from arrests that had been made.

The Witness: My knowledge—the names, I just gave them to you, I know them of my own knowledge.

The Court: Anyone else?

The Witness: John Zokowsky, alias Socks.

The Court: That is apparently in the list.

Mr. Greis: Yes, sir.

Q. Yes, Proceed.

A. I am trying—Joseph Siai.

Mr. Greis: I ask it be stricken.

Mr. Loveland: Consented to, your Honor.

The Witness: There is quite a list of these names, but I just can't recall just now.

Q. I ask you, Captain, whether these three defendants are members of the Lanzetti gang?

A. They sure are.

Q. I ask you how long you have known these defendants are in the Lanzetti's?

[fol. 85] A. I have known the Lanzetti's as I said before, practically all my life. I have been familiar with the man mentioned here in the last eighteen years—last fifteen years. And Falcone, I have known him since 1923, 1924. And Fatty Louie, I have known him for about twelve years. I think that would cover it.

Q. How long has the gang been in existence, Captain?

Mr. Greis: That is objected to, if the Court please.

The Court: If he knows, I am going admit it.

Q. Of your own knowledge.

Mr. Greis: May I state my objection upon the record?

The Court: If you want to.

Mr. Greis: I think the Court has already ruled that—upon my objection, that it be—the names of membership in the gang be limited to the period charged in the indictment, and this is based upon the same ground.

The Court: Well, he has spoken of the three members, the Prosecutor has, and he is referring to this gang consisting [fol. 86] of the defendants and these three additional members. Now I think that is your question, is it not?

Mr. Loveland: Yes, I am asking how long he has known this gang to have been in existence.

The Court: This gang, consisting of the three people that have been mentioned, in addition to the three defendants. Is that right?

Mr. Loveland: Yes, your Honor, I am just asking if these were members of the gang. He testified they were, and I have asked him how long he has known——

The Court: That is the way I understand it. I will admit the question.

Mr. Greis: Your Honor will allow me an exception.

The Court: It will be granted.

(To which ruling the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Palmer M. Way, P. J. (Seal.)

A. About five or six years. That is, this present gang I mentioned.

[fol. 87] Q. Can you tell us what kind of a gang it is, Captain?

A. Well, from our experience with them, none of them have any——

Mr. Greis: Just a moment, if the Court please. That answer apparently does not—is not responsive to the Prosecutor's question, so I object to it. Calls for a conclusion, and the witness prefaces his answer with "our experience".

The Court: I think you will have to keep within your proof, Prosecutor.

Mr. Loveland: Yes, your Honor.

Q. Captain, I don't want you to testify to anything other than your own personal knowledge. Now I ask you from your own personal knowledge can you tell us anything of what kind of a gang it is?

A. The gang is connected with numbers, and at one time, your Honor, there were—unless—at one—they was connected with numbers and other rackets in Philadelphia.

Mr. Loveland: You may cross-examine.

Cross-examination.

By Mr. Greis:

Q. Captain, where did all this take place that you speak of?

A. All what? Numbers?

[fol. 88] Q. Yes.

A. In one——

Q. What place; that is all I want to know.

A. I just can't recall the address on Broad Street where they were arrested.

Q. What city?

A. Philadelphia.

Q. In the State of Pennsylvania, is that correct?

A. That is right.

Q. And you say that gang that you speak of is some five or six years ago?

A. Yes. From five or six years on, on to the present date.

Q. Yes. And when did you last see any of these three defendants as connected with any gang prior to the day of the arrest?

A. Well, I probably say nine months.

Q. About nine months before that?

A. Yes.

Q. And the things that you mention, numbers and other rackets——

A. Yes.

Q. Has there within five or six years been any conviction or charge against these men for that reason?

A. That numbers? Yes, sir—these men here?

Q. Yes.

A. No, sir.

Q. Captain, how long had it been prior to your visit to Wildwood on July 24th—is that the date?

A. That is right.

[fol. 89] Q. How long had it been prior to that time that you had seen any of these three men?

A. Why, I would say about nine months.

Q. About nine months?

A. Yes.

Q. And that was where? In the City of Philadelphia?

A. That is right.

Q. You knew that Falcone was a prize fighter at one time?

A. Yes, I knew of it; yes, sir.

Q. And you know that he fought under the name of Mickey Britt; is that correct?

A. Yes.

Q. Will you tell us now what was the occasion of your visit to Wildwood on the 24th of July?

A. Yes. We had information—I spoke of a letter we received, and it instructed us to go to——

Q. Was it connected with these defendants?

A. None whatever.

Q. Not connected with these defendants?

A. No, sir.

Q. But you just happened upon these men while you were in Wildwood; is that correct?

A. Location—give us the location of this here—of these people mentioned; but at the time, why, we were in search of men for the hold-up that happened in our city.

Q. And these were not the men, were they?

A. They were not the men it mentioned.

Q. You had no warrant at the time—for these men, at the time you made the arrest?

A. No, sir.

[fol. 90] Q. And you had no warrant for a search of the premises?

A. No, sir.

Q. But you made a search of the house?

A. Yes. We thought we probably might find the people we were looking for, besides those men.

Q. You were a member of the Philadelphia Police Department?

A. Right.

Q. At whose suggestion were these men taken into custody on the date that you walked in on them there?

A. Well, I told Sergeant Kelly and—who these men were, and decided to take them in, and charge them with being gangsters.

Q. Did you know about the New Jersey gangster law?

A. I didn't at the time, no.

Q. Are you sure about that?

A. I say I didn't know at the time, no sir.

Q. Who sends out information from the Philadelphia Police Department that certain people are wanted?

A. The Police Department. We do.

Q. You do. Your department?

A. Yes.

Q. Are you in charge of that?

A. Not in charge of it, no. I am — charge of the Detective Bureau.

Q. You mentioned only two names that were allowed by the Court in this list here, aside from the two brothers Lanzetti and the defendants. John Zokowsky was one of them?

[fol. 91] A. Yes, sir.

Q. Where is John Zokowsky?

A. In the death house, awaiting for the electrocution.

Q. How long has he been there?

A. Two years, I believe.

Q. How long?

A. A little over two years.

Mr. Greis: Now, if the Court please, on the limitation that was put on this defendant's testimony by the Court in the first place, the gang that existed on the date of the arrest, I ask that that name be stricken. He has been in the death house for two years. Certainly could not have been——

The Witness: Hasn't been in the death house. He has been in jail in custody.

Q. He has been in jail in custody. He has not been a member of the gang in that time?

A. He has been a member up until the time of the arrest.

Mr. Greis: I understood the Court's limitation, it was on the date of the arrest.

The Court: I am permitting you to adduce such testimony as you can bring out on cross-examination. You may use it with the jury. I will let that testimony stand.

Q. Let me ask you this question, Captain: This business [fol. 92] you mention as numbers, is that an illegal proposition?

A. It is in our state, yes, sir.

Q. It is contrary to the laws of Pennsylvania?

A. Yes, sir.

Q. Now, have there been any arrests or conviction of these men in that connection, any of these three defendants, Willie Lanzetti or Pius Lanzetti?

A. Willie Lanzetti has been, yes, sir. Willie and Lucien both have been arrested for numbers and convicted.

Mr. Greis: I ask the testimony concerning Lucien be stricken out as not responsive. The name was stricken from the list.

The Court: Didn't you ask him a question and give the man's name?

Mr. Greis: I didn't ask for the brother who is not in here, not charged as a member of this gang.

The Court: Didn't you ask for Lucien? Let me have the question.

(The question was read by the stenographer as follows: "Q. Now, have there been any arrests or conviction of these men in that connection, any of these three defendants, Willie Lanzetti or Pius Lanzetti?")

[fol. 93] The Court: Willie or Pius are the only ones used.

The Witness: Willie Lanzetti is the one arrested and convicted for numbers.

Q. When?

A. 1934 or 1935, I believe.

Q. Don't you know?

A. I would have to consult this—these—this folder.

Q. There are no detainers nor warrants out for these men, are there?

A. No, sir.

Q. They are not wanted in the city of Philadelphia?

A. No, we don't want them in Philadelphia.

Q. If there had been any charges against them, you would have had them extradited to Philadelphia, wouldn't you?

A. I guess so.

Mr. Greis: That is all.

Mr. Loveland: Captain Creeden.

JOHN J. CREEDEN, called as a witness on behalf of the State, being sworn, testified as follows:

Direct examination.

By Mr. Loveland:

[fol. 94] Q. Captain Creeden, are you connected with the Philadelphia Police Department?

A. I am.

Q. And have been so connected for how long?

A. A little better than twenty-six years.

Q. Do you know the defendants here?

A. I do.

Q. Do you know of a gang called the Lanzetti gang?

A. I know some of them.

Q. Can you tell us whom you know of them?

A. Well, there is four of the Lanzetti boys. They are classified as the Lanzetti gang. They are constantly together and it — very rarely you see—you meet them that there are not at least two together; and we classify those that are associated with them as part of the Lanzetti gang.

Q. Now, do you know any other member?

A. Through police channels and police reports I know quite a few.

Mr. Greis: That is objected to, if the Court please.

The Witness: Personally I know——

Mr. Greis: The source is hearsay.

The Court: Well, he has not named anyone yet, Mr. Greis, [fol. 95] and I am going to let it stand so far, unless something happens. Personally you what?

The Witness: Personally I could call just a few of them off.

Q. Let's have those that you know personally, Captain.
A. Julius Fink.

Mr. Greis: That name is objected to, if the Court please. Not within the bill of particulars.
Mr. Loveland: We consent.
The Court: Consented to. It may be stricken.

Q. Continue, Captain.
A. Michael Amateo.

Mr. Greis: That name has already been objected to once before, may it please your Honor.
The Court: That is objected to.
The Witness: Tony Narcise.
The Court: Tony what?
The Witness: Tony Narcise.
[fol. 96] The Court: That is in the list. Anthony Narcisi.

Q. Continue, Captain.
A. Walter Zokowsky I think is the right name.

Mr. Greis: That is not in the list. There is a John Zokowsky in there.
The Court: What was the last name, Captain?
The Witness: Zirkowsky I think is the last name.
Mr. Loveland: If my memory serves me as to the list——
The Court: What was the first name?
Mr. Greis: Walter.
The Witness: Walter, I believe it is.
Mr. Greis: Walter. That is not in the list and I ask it be stricken.
Mr. Loveland: Consented to.
The Witness: Louis Campbell.
The Court: That is in the list apparently. Proceed.
[fol. 97] The Witness: That is all I can think of offhand.
Q. That is all you can think of offhand, you say, Captain?
A. Yes, sir.
Q. These defendants are known to be a member of a gang?
A. We recognize them as a member of the Lanzetti gang.

Mr. Loveland: Cross-examine.

Cross-examination.

By Mr. Greis:

Q. Captain, where is Louis Campbell?

A. Louis Campbell? I think he is imprisoned in this state. I am not sure.

Q. Do you know how long he has been there?

A. I couldn't tell you without looking at the records.

Q. When did you last see him?

A. Couldn't tell you that, without referring to police record.

Q. Well, that has not been in recent years, has it?

A. I don't think I have seen Campbell for three or four years. I couldn't say definitely.

Q. How long since you have seen Tony Narcise?

A. Possibly four years.

[fol. 98] Q. About four years?

A. Possibly four years. I have seen Narcise and Louis together, last time I seen them in the Bureau.

Q. Louis who?

A. Del Rossi.

Q. Saw them together four years ago?

A. I should judge that was four years ago.

Q. And is that what you base your conclusion on that he—that they are members of the gang?

A. No.

Q. That you saw them together four years ago?

A. Constant reports I get, written and verbal, from the men of the Bureau.

Q. I see; and it is not from your own knowledge, it is from the reports that you have from others?

A. I have formed my opinion from the knowledge I gained through police channels and police report.

Q. And you have told all that you know about it personally?

A. About whom?

Q. About Campbell and Narcise?

A. That is all I have heard from them, is the reports, is all. That is the last time I have seen them.

Mr. Greis: That is all.

[fol. 99] Redirect examination.

By Mr. Loveland:

Q. Captain, you say you have not seen Narcise for the past four years, approximately?

A. I may have seen him since then, but I am satisfied the last time I seen Narcise was the time of the arrest in the Bureau, brought into the Bureau.

Q. I ask you whether or not the Philadelphia Police Department want him?

Mr. Greis: That is objected to as not relevant or material.

Mr. Loveland: I might explain the reason why.

The Court: You are on re-direct, Mr. Prosecutor.

Mr. Loveland: But what I was getting at, the defense brought out the fact that the Captain has not seen this man during the past four years. I was trying to find out if there was any reason.

Mr. Greis: That doesn't make any difference, if the Court please.

The Court: Let me have the question.

Mr. Loveland: I will not press it. I will withdraw it.

The Court: If you want it, we will see whether it is proper or not.

[fols. 100-104] (The question was read by the stenographer as follows: "I ask you whether or not the Philadelphia Police Department want him?")

The Court: That does not seem to be in the——

Mr. Loveland: I will withdraw that. I thought they opened it up far enough for me to question.

The Court: No.

Mr. Loveland: That is all, Captain.

[fol. 105] Francis J. Dunn, called as a witness on behalf of the State, being sworn, testified as follows:

Direct examination.

By Mr. Loveland:

Q. Mr. Dunn, you are a member of the Philadelphia Police Department?

A. Yes, sir.

Q. I ask you whether you made the arrest of Frank Pius Lanzetti in 1924?

Mr. Greis: That is objected to, if the Court please.
The Court: What was the question?

(The question was read by the stenographer as follows: "Q. I ask you whether you made the arrest of Frank Pius Lanzetti in 1924?")

The Court: Mr. Prosecutor, at this time, I don't see——
Mr. Loveland: It is incumbent on the State to prove conviction of these defendants, and the State is endeavoring to do that, if your Honor please.
The Court: I see what you are getting at now. Don't you think you better go at that another way?

[fol. 106] Q. Mr. Dunn, did you ever arrest Frank Pius Lanzetti?

Mr. Greis: That is objected to.
The Court: Objection sustained.

Q. Mr. Dunn, I ask you whether you were in court on April 3rd, of 1934, in the City of Philadelphia at the time Frank Pius was on trial?

Mr. Greis: That is objected to, if the Court please.
The Court: Question allowed. That probably will lead—no harm in the question itself. Must be followed up in order to permit me to admit it.
Mr. Greis: Withdraw the objection.

Q. Will you answer that question?
A. Yes, sir.
Q. I ask you whether there is anyone present here today who was on trial at that time?
A. Yes, sir. Lanzetti. Ignatius Lanzetti.
Q. Is he one of the defendants here?
A. He is, yes.
Q. I ask you whether you know the results of the trial?

Mr. Greis: That is objected to, if the Court please.
The Court: Objection sustained because of the fact there [fol. 107] is no indication of what kind of trial, whether a conviction or what not.
Q. I ask you whether you know, Mr. Dunn, whether this defendant, Frank Pius Lanzetti, was on trial at that time, and if you know what the charge was.

Mr. Greis: That is objected to.

Mr. Loveland: He was present there, and I am asking whether he knows or not.

The Court: What the charge was. We will find out whether he knows.

Mr. Greis: If the Court please, I object to this, upon the ground that there is a proper way to prove this by the best evidence. That is, the announced purpose of the Prosecutor is to prove the conviction, and all we ask is he go about it in the proper way.

The Court: All he has to be asked, if the man is present in court, and what took place. Put it that way.

Mr. Loveland: I have just asked that question.

The Court: It is not necessary to ask him any preliminary questions?

Mr. Loveland: May we have that question again? (The question was read by the stenographer as follows: "Q. I [fol. 108] ask you whether you know, Mr. Dunn, whether this defendant, Frank Pius Lanzetti, was on trial at that time, and if you know what the charge was?")

A. Yes.

Q. Do you know?

A. Yes, sir

The Court: I will let that stand. But it will not remain standing unless I find that it is proper to admit it.

Mr. Greis: Your Honor will allow me an exception?

The Court: Granted.

(To which ruling the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.)

Palmer M. Way, P. J. (Seal.)

Q. Now, I ask you whether or not Frank Pius Lanzetti was at that time convicted of the charge for which he was on trial?

A. No, sir. Plead guilty.

Q. Plead guilty. (Showing paper to witness.) I ask you to look at that and ask if that is the record of those proceedings?

A. Yes, sir.

Q. (Showing witness another paper.)

[fol. 109] A. Yes, sir.

Mr. Loveland: At this time I offer the record, exemplified copies of the proceedings in Philadelphia, covering the conviction against Frank Pius Lanzetti.

The Court: In the first place, we must know for what crime.

Q. Do you know what crime?

A. Yes, sir.

Q. What crime?

Mr. Greis: Just a moment. I object to that, if the Court please.

The Court: Object to what?

Mr. Greis: The question of what crime it was.

The Court: What?

Mr. Greis: The question of what crime it was. Absolutely incompetent, irrelevant and immaterial.

The Court: Let me get this man's qualifications. I don't know what position he is holding. I was busy with the clerk.

Mr. Loveland: This witness testified that he was a member of the Philadelphia police department, that he was in [fol. 110] the court room at the time this trial took place, and you can't get better evidence than that. He says he knew what happened, and I am asking now whether he knew what crime this defendant was charged with.

The Court: Charged or convicted of?

Mr. Loveland: He said he plead guilty. I have shown him the record of the proceeding.

The Court: I will permit the question, to find out if he knows what he plead guilty to, of what charge.

Mr. Greis: Exception.

The Court: Exception granted.

(To which ruling the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.

Palmer M. Way, P. J. (Seal.)

A. He plead guilty to the unlawful possession and sale of narcotic drugs.

Mr. Loveland: I renew my offer of the introduction of the exemplified copy of the proceedings.

Mr. Greis: If the Court please, while I was looking at [fol. 111] these papers I didn't get the answer to the last question. May I have it repeated?

The Court: Yes; Mrs. Moore will read it for you. (The answer was read by the stenographer as follows: "A. He plead guilty to the unlawful possession and sale of narcotic drugs.")

Mr. Greis: Now, if the Court please, the document here produced, the certified copies of the records, don't show that. The plea that was entered here by one Frank Pius, without any name "Lanzetti" being expressed in the documents, is for possession only.

Mr. Loveland: I think that question is covered. I asked the defendant whether anyone present here today was on trial in the court at that time; he said there was, and I asked him who it was, and he told us it was Lanzetti.

The Court: I think perhaps the identification is sufficient. The question has to be whether the testimony of having heard a confession or having heard a plea amounts to a conviction, is the same as that which you are attempting to show here by the exemplified copies. Apparently there is an inconsistency, Mr. Prosecutor, and you have no foundation for the presentation of something that you have not already spoken about. Do you understand what I mean?

Mr. Loveland: No, I do not.

[fol. 112] The Court: Well, your conviction sets forth one crime. The witness has testified that he was present at the time, and there was another crime committed in addition, as I recall the statements in the testimony. If that is so, of course the exemplified copies cannot go in.

Q. Now I ask you, Mr. Dunn, whether the defendant on trial who plead guilty on April 3rd, 1924, under the name of Frank Pius, is the same person sitting here as a defendant in these proceedings, under the name of Ignatius Lanzetti?

A. Yes, sir. There is three brothers. He is one of them.

The Court: Just answer the question.

The Witness: Yes, sir, He is the man. Three brothers.

Q. He is the man that plead guilty?

A. Yes, sir, They all plead guilty.

Mr. Greis: I ask that it be stricken out as a voluntary statement and not responsive, not material.

The Court: Yes; that may be stricken out, that latter part.

Q. Now I ask you whether or not these proceedings (showing paper to witness) set forth the results of what took place on that day?

[fol. 113] A. Yes, sir.

Mr. Loveland: Now, if the Court please, I renew my offer, and the records in these proceedings speak for themselves. And if there is any question about it, it is a matter for cross-examination, because our Evidence Act, Section 1—under the constitution you must give full faith and credit to the records and proceedings of the other states. Now this defendant—this witness has testified he was in court on this day and he said that they plead guilty to unlawful possession and sale of drugs. I think that was it. And if the records do not speak that, why, that is a matter for cross-examination. This is an exemplified copy of the proceedings and must be given full faith of what happened.

Mr. Greis: Now, if the Court please, the witness testifies to one thing and the evidence produced here just exactly contradicts that.

The Court: Well, Mr. Greis, now he says, after having looked at the exemplified copy, that that statement set forth in the exemplified copy is what transpired that day; so I think that has been cured, and I will admit it.

(The papers offered are received in evidence and marked Exhibit S-1 and Exhibit S-2.

Mr. Loveland: That is all. Cross-examine.

[fol. 114] Cross-examination.

By Mr. Greis:

Q. Mr. Dunn, when was the last time that you had seen Ignatius Lanzetti?

A. The last time I saw him was when he got out of jail.

Q. Out of jail?

A. Yes, sir.

Q. How long ago was that?

A. I believe 1925 or 1926.

Q. Yes.

A. 1925, I believe it was.

Q. Now, you saw him when he came back from Detroit, didn't you?

A. No, sir. I think he only got out that day or the day after from the County Prison.

Q. How long have you been a member of the police department of Philadelphia?

A. Seventeen years.

Q. Still a member?

A. Yes, sir.

Q. Been continuously all this time?

A. Yes, sir.

Q. It has been since 1925 since you have seen this man before today, is that right?

A. See him in—outside of seeing him on the street, yes; that is, to see him anywhere where I would be looking for him.

Q. I asked you that question, when was the last time you [fols. 115-117] saw him; you said when he came out of jail in 1925.

A. 1925. Yes. I might have seen him since then in passing him, and wouldn't remember.

Q. Yes. Unless you gave me that answer you couldn't say he had been in jail, could you; is that the idea?

A. That is—I gave you what answer?

Q. That the last time you had seen him was when he came out of jail in 1925?

A. I remember that specifically. If you want me to explain it, I will explain why I remember that.

Q. I want to know when you saw him last after that.

A. After that?

Q. Yes.

A. I don't know if I have ever saw him since.

Q. Don't know whether you have or not?

A. He might have been in the car with other ones; I don't know.

Mr. Greis: That is all.

[fol. 118] CHARLES STEINBERG, called as a witness on behalf of the State, being sworn, testified as follows:

Direct examination.

By Mr. Loveland:

Q. Mr. Steinberg, are you a member of the Philadelphia Police Department?

[fol. 119] A. Yes.

Q. Do you know the defendants here?
A. Yes, sir.
Q. Do you know of a gang called the Lanzetti gang?
A. Yes, sir.
Q. Are these defendants members of it?
A. Yes, sir.
Q. Do you know others who are members of it?
A. Yes, sir.
Q. Name them.
A. John Schiavo. John Amato.

The Court: Slowly, please.

Q. Just one at a time.

The Court: John Schiavo apparently is in the list. Proceed.

The Witness: John Amato.
The Court: Apparently is in the list.
The Witness: Max Rothman. Willie Lanzetti.
The Court: Just a minute.

Q. What was that name?
A. Willie Lanzetti.

The Court: Rothman—oh, yes, I see it.
[fol. 120] Loveland: William Lanzetti was the last one.
The Court: Yes. Proceed, unless there is an objection after a reasonably short pause.
The Witness: Michael Mateo.
Mr. Cafiero: Not on the list.
Mr. Greis: I ask that one be stricken.
Mr. Loveland: Consented to.
The Court: Proceed.
The Witness: Frank Mateo.
Mr. Greis: I ask that the name be stricken; not on the list.
Mr. Loveland: Consented to, your Honor.
The Witness: I can't think of any more right now.
Mr. Loveland: Cross-examine.

Cross-examination.

By Mr. Greis:

Q. When did you last see Max Rothman?
A. About eighteen months ago.

[fol. 121] Q. About eighteen months ago. Have you seen him since that time?

A. I can't say that—I don't recall.

Q. Don't you know for a fact that Herman Rothman is not friendly with any of these men?

A. He was in company——

Q. Just answer that yes or no.

A. What was that? How is that question?

Q. Don't you know that Max Rothman is not friendly with any of these men?

A. I don't know him not to be friendly with them. I know him to be friendly with them.

Q. You think he is friendly with them?

A. Yes, sir.

Q. How long ago was that that you know him to be friendly?

A. Since I seen him last, and I have never heard that he was not friendly with them.

Q. That is eighteen months ago?

A. I have never heard since that he was not friendly with them.

Q. Do you know anything about his connection with any of these men or with anybody else since that time, since eighteen months ago?

A. Not offhanded, I can't say.

Q. Now you mentioned John Schiavo?

A. Yes, sir.

Q. He is the clerk of a court for somebody?

A. That is not the Schiavo.

Q. That is not the one. What one are you talking about?

A. I am speaking of another Schiavo.

[fol. 122] Q. John Schiavo, 811 South 11th Street, Philadelphia.

A. The gentleman you are referring to does not live there.

A. I am referring to a John Schiavo with a known criminal record that I know, that lives in South Philadelphia.

Q. Doesn't live at 811 South 11th Street?

A. I can't give you the exact address now.

Q. Well, the John Schiavo at 811 South 11th Street is clerk of Magistrate O'Malley's court?

A. There is a John Schiavo, a clerk, I know.

Q. That is his address, isn't it?

A. Not as far as I know, no, sir. He lives on Franklin Street, as far as I know.

Q. Don't you know he has moved from Franklin Street down to 811 South 11th?

A. Didn't know that, no, sir.

Q. Or has moved from this address to Franklin Street, one or the other?

A. The Schiavo I know lives on Franklin Street. I have known him for nine or ten years, and I know him to live down there. No, I wouldn't say that—I have known him six years, anyway, and known him to live on Franklin Street.

Q. Well, is the man that you are speaking about the one who lives now or did live in the past at 811 South 11th Street?

A. I didn't know the exact address where he lived. I knew he lived down in that section.

Q. Is he the same man or isn't he?

A. No, sir, he is not the clerk of the magistrate's court.

[fol. 123] Mr. Greis: If the Court please, I ask that the testimony concerning that witness on this mistaken identification be stricken out, because our list has a name and address that is the name we refer to. Apparently it is some one else of the same name, who is not in our list.

The Court: What right do you think you have to strike it? You brought out facts stating the address of a John—what is he name?

Mr. Greis: Schiavo.

The Court: There is some confusion about the address. I think I will leave the matter stand.

Mr. Greis: Your Honor will allow me an exception.

The Court: Grant you an exception.

(To which ruling the defendants by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.

Palmer M. Way, P. J. (Seal.)

Q. When is the last time before today that you saw these three defendants here?

A. The time of their arrest.

Q. You were here at the time of the arrest?

A. Yes.

[fols. 124-131] Q. When prior to that did you last see them? That was July 24th, I believe, wasn't it?

A. Yes, sir.

Q. When was the—how long before that?

A. Between then—numerous—Louis I have seen about three times between the first of the year and then, or latter part of January and then.

Q. Where at?

A. On the street.

Q. Where? What city? What state?

A. In Philadelphia.

Q. Philadelphia, Pennsylvania?

A. I don't recall seeing the other two defendants.

Q. Haven't seen them for how long before—or had you ever seen them before the day of the arrest?

A. I seen Lanzetti about three or four years prior to their arrest.

Q. Three or four years prior. Did you ever see Mickey Britt?

A. I don't recall.

Q. Don't recall ever having seen him? Don't recall ever having seen him?

A. I wouldn't say—I have seen him but I just can't recall when it were.

Mr. Greis: That is all.

[fol. 132] GEORGE MUHS, called as a witness on behalf of the State, being sworn, testified as follows:

Direct examination.

By Mr. Loveland:

Q. Mr. Muhs, are you a member of the Philadelphia Police Department?

A. I am.

Q. How long have you been a member?

A. About twelve years.

Q. Do you know the defendants here?

A. I do.

Q. Do you know the gang called the Lanzetti gang?

A. I do.

Q. Are these defendants members of that gang?

A. They are.

Q. Do you know other members of the gang?

A. I do.

Q. Will you please tell us who — are?

A. John Amata, Hyman Cohen, Daniel Falcone, Tony Narcise, Max Rothman, Felix DiTullio, and Teo Lanzetti.

[fol. 133] Mr. Greis: That name was objected to, and I ask it be stricken.

Mr. Loveland: Consented to.

The Witness: Willie Lanzetti, and Pius Lanzetti.

Mr. Loveland: Cross-examine.

Cross-examination.

By Mr. Greis:

Q. Do I understand you to testify that Hyman Cohen——

A. Hyman Cohen.

Q. —is a member of the Lanzetti gang?

A. He is friendly with that gang, yes.

Q. He is?

A. He is.

Q. What do you mean, that he is friendly with them?

A. Well, they are all associated together; you see them congregating together at times.

Q. And that in your mind means membership in the gang, does it?

A. Well, they don't have what you call a membership card, but they are congregated together.

Q. Are any of these names that you have stated here members of this gang?

A. They are all associates of one another, all work together.

[fol. 134] Q. I asked you the word "member". Will you answer that, please?

A. Yes.

Q. They are all members, are they?

A. Yes.

Q. Is Hyman Cohen a member?

A. He is.

Q. At the present time?

A. Well, can't say right at the present time, no.

Q. When can you say that he was a member of it?

A. Oh, about two years ago.

Q. About two years ago?

A. Yes.

Q. And you don't know anything about him in the last two years?

A. No, I don't.

Q. Then you qualify your answer to my first question, "Is he a member of the Lanzetti gang?" and you say that he was two years ago; is that right?

A. Yes.

Q. How about Felix DiTullio; when was he a member?

A. Oh, around about two years ago.

Q. About two years ago. Since that time he has been in the States Prison, is that right?

A. He is in Trenton prison now.

Q. That is right. Do you know whether going to prison would terminate his membership or not in the gang?

[fol. 135] A. Well, it all depends what you determinate membership.

Q. That is what I want to know. I want you to tell me. Is he a member of the gang if he is in States prison?

A. There is such a thing as helping a man out when he is in prison, yes.

Q. And you think he is still a member, is that it?

A. I would say yes.

Q. How about Daniel Falcone?

A. Yes.

Q. Where does he live?

A. Why, he lives around Catharine Street, South Philadelphia, somewhere; I just don't know just the exact place where any of them live, as far as that goes.

Q. And what leads you to believe he is a member of this gang?

A. See him associate with them.

Q. When?

A. Friendly with them.

Q. When last?

A. Oh, I haven't seen Daniel Falcone—about two years ago I guess I saw him.

Q. About two years ago. Do you know that Daniel Falcone is a relative of the defendant Michael Falcone?

A. His brother.

Q. It is his brother?

A. Yes.

Q. Are you sure of that?

[fol. 136] A. Well, I stopped him and asked him, and he said he was his brother; he told me that.

Q. Said he was his brother?

A. That is what I am taking his word for it.

Q. What does he look like?

A. Well, he resembles Mickey Britt to a certain extent.
Q. Looks like Mickey, eh?
A. Yes.
Q. Where is the office of the Philadelphia Police Department?
A. City Hall—well, headquarters, City Hall.
Q. Headquarters in City Hall?
A. Yes.
Q. Would it surprise you if I told you Daniel Falcone is working right there in the City Hall?
A. Not the Falcone that I have reference to.
Q. Not the one you mean?
A. No, sir.
Q. Which one do you mean, then?
A. Well, the Daniel Falcone I am speaking of and classing as Mickey Britt's brother is a fellow hangs in the cigar store at Broad and Rodney at the time I used to go in there and see who was in there.
Q. And how long ago was that?
A. Two years ago.
Q. Two years ago?
A. About two years ago.
Q. There is only one Daniel Falcone, as far as you know?
A. Well, there could be others that I don't know of.
[fol. 137] Q. How long ago did you see Tony Narcise?
A. Oh, better than two years, I guess.
Q. Over two years?
A. Yes.
Q. How long since you saw Max Rotherman?
A. About the same time; around two years ago.
Q. Is that the last personal knowledge that you have concerning these men?
A. Yes.
Q. Outside of the reports by somebody else? I mean your own personal knowledge, what has come to your personal attention.
A. What I have seen myself.
Q. Yes.
A. Yes.
Q. And that is the last?
A. Yes.
Q. When did you last see Ignatius Lanzetti before today or before the time of the arrest?
A. About a year ago.

Q. About a year ago?

A. About a year ago.

Q. And when did you last see Mickey Britt and Michael Falcone?

A. I haven't seen him in about eighteen months, I guess.

Q. Eighteen months. And how long since you saw Del Rossi before the time of this arrest?

A. About the same—last time I seen him. Del Rossi and Mickey Britt were together.

Q. About a year?

A. It is about a year ago; around in there.

[fols. 138-150] Q. You said you did not know Daniel Falcone's address, did you?

A. No, I don't. I don't know any of these addresses, I see.

Mr. Greis: That is all.

[fol. 151] (In Chambers)

MOTIONS FOR DIRECTED VERDICT

Mr. Greis: Now, if the Court please, I move for the direction of a verdict of acquittal for each of the three defendants, on the following grounds:

First, that in the indictment itself no act is alleged to have been committed that controverts any penal statute of the State of New Jersey.

Second, that the indictment fails to charge a crime, fails to set forth the date, place or tribunal of any alleged conviction in the State of Pennsylvania or elsewhere, and that the indictment is otherwise vague, uncertain and indefinite.

The Court: Is that all under number two, Mr. Greis?

Mr. Greis: Yes.

Third, that the charge laid under the indictment and, in fact, the indictment itself under which the charge is brought, violates Article IV, Section 2 of the Federal Constitution, to the effect that citizens of each state shall be entitled all the privileges and immunities of citizens of the several states.

[fol. 152] (Discussion off the record.)

The Court: You might put in the record that I have asked Mr. Greis to state each reason separately and upon the statement of the reason argument will be immediately had and disposed of as we proceed. Then, of course, you will have a right to go back over your ground.

Mr. Greis: In the three reasons that I have already stated.

The Court: Not only these three reasons, but any number of reasons that you have assigned.

Mr. Greis: In that case, if your Honor please, I will argue the second reason that I assigned. I won't argue the first because the Court, as a matter of fact, has ruled upon each of these several reasons in the motion to quash before the plea, and overruled them.

On the second reason assigned, that is, that the indictment fails to charge a crime, I would like also to add that I question and suggest to the Court that it has no jurisdiction, and in my argument I will show your Honor what that is based on.

This indictment charges, after naming the parties, at the Borough of Wildwood Crest, on the 12th, 16th, 19th and 24th days of July, 1936, and within the jurisdiction of the court, they and each of them not being engaged in any lawful [fol. 153] occupation, they and all of them known to be members of a gang consisting of two or more persons, they and each of them having been convicted of a crime in the State of Pennsylvania, are hereby declared to be gangsters.

Arguing together the question of the indictment itself as charging a crime and the question of the Court's jurisdiction, it is an absolute proposition of law and of statutory construction that a statute must charge acts that are committed within the jurisdiction of the Court. In other words, we know the well-settled rule that a crime committed in some other county aside from the County of Cape May, or in some other state, is cognizable under the government in that jurisdiction. For instance, if it were committed in Gloucester County, it would be charged and it would be tried there, and the Court in this county would have no jurisdiction. Likewise, if the matter were something arising in the State of Pennsylvania, that is a sovereign state, with jurisdiction and courts of its own, and with laws of its own, and we have no jurisdiction over matters not committed or charged within our own county.

The indictment, as a matter of fact, does charge that on these dates these set of circumstances or status of the de-

fendants existed. But it charges no overt act of any kind or description having been committed within the jurisdiction of the court. In other words, a crime, as to all law up to the passage of this statute has always construed it, is the [fol. 154] doing or not doing of some particular act. In other words, it is an act of omission or commission. But here is an attempt made by statute under the fourth section of his so-called gangster act of 1934, Chapter 155, to make a person in a given status a criminal, chargeable under this act, indictable and punishable by a fine of $10,000 or twenty years in states prison, or both.

Now, if your Honor please, at a very early date our courts held, and held very decisively, in the case of State against Carter, 27 Law, 499, in an opinion by Justice Vredenburgh, of the Supreme Court of this State, the salient part of which is on page 501:

"If the acts charged in this indictment be criminal in New Jersey, it must be either by force of some statute or upon general principles. There is no statute, unless it be the act to be found in Nixon's Digest 184, Section 3. But this evidently relates to murder only, and not to manslaughter.

"But I cannot make myself believe that the legislature, in that act, intended to embrace cases where the injury was inflicted within a foreign jurisdiction, without any act done by the defendant within our own. Such an enactment, upon general principles, would necessarily be void; it would give the courts of this state jurisdiction over all the subjects of all the governments of the earth, with power to try and punish them, if they could by force or fraud get possession of their persons in all cases where personal injuries are followed by death."

[fol. 155] And concluding the opinion, the Justice says:

"It is said that if we do not take jurisdiction, the defendant will go unpunished, inasmuch as the party injured not dying in New York, he could not be guilty of murder there. But New York may provide by law for such cases, and if she does not, it is their fault, and not ours. The act done is against their sovereignty, and if she does not choose to avenge it, it is not for us to step in and do it for them.

"I think that the Oyer and Terminer should be advised that no crime against this state is charged in the indictment."

Now, I base the motion for direction on that ground, on the jurisdictional ground, upon the fact that each of the state's witnesses upon cross-examination have admitted that they know nothing of the defendants, of their personal knowledge, and, in fact, have not seen them for anywhere from nine months, eighteen months, two years, up to ten or twelve years, in each case, against each of the defendants, in the evidence of each of the Prosecutor's witnesses produced against these defendants. That is prior to the date of the arrest, and the date of the arrest, of course, the 24th of July, is one of the dates charged in the indictment, and the other dates being the 12th, 16th and 19th of the same month. In other words, there is before this court at the present time no evidence of any witness on the part of the State charging these defendants with even the matters con-
[fol. 156] tained in the statute, which I say is not a crime and does not constitute a crime, but even the proof is lacking that any of this condition existed closer than nine months. The one witness that came closest to these dates was the witness Captain Ryan, whose testimony was nine months, and his time was the shortest. Every other witness gives a longer and further date in front of or before the dates charged in the indictment.

Under those circumstances, it seems to me that the Court not only should direct this verdict upon the ground that the State has failed to prove its case in that particular, but upon the additional ground that no charge as made in the indictment and during the periods covered in the indictment has been proven before the Court by any witness for the State.

Mr. Loveland: If the Court please, the State asks that the motion be dismissed. The overt act set forth in the statute is membership in the gang. The State has proven the existence of the gang as stated by the defense in the City of Philadelphia, and the State has proved the existence of the gang at the present time. There is testimony to the effect that they were present, and the testimony is all the items in the indictment have been proved, that they were within the jurisdiction of this court. It has been so testi-

fied by several different witnesses. Ruggerio and Kelly and Ryan and Hamilton, all of them testified of the presence of these persons, and the entire line of State's wit- [fol. 157] nesses have said that the defendants are members of the gang and continue so to be.

The Court: Without any further comment on my part, I will deny your motion, Mr. Greis, on that reason.

Mr. Greis: Your Honor will allow me the customary exception?

The Court: It will be granted.

(To which ruling the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.

Palmer M. Way, P. J. (Seal.)

Mr. Greis: I would like to add the further comment upon that same subject, that we suggest that the existence of a gang, what was meant by a gang, what constitutes a gang, was not proven by the State, what kind of gang or what—just what they meant. They merely made the blanket statement that they were members of a gang, which I think is not sufficient proof of its existence.

The Court: Now, I assume that you make that statement in order that your record concerning your thoughts might be complete on this point.

Mr. Greis: Yes.

The Court: And that you probably desire a re-statement [fol. 158] of my ruling in order to have your exception cover that.

Mr. Greis: That is correct.

The Court: Very well, you will be permitted an exception, as my ruling will be the same, and is the same.

(To which ruling the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.

Palmer M. Way, P. J. (Seal.)

Mr. Greis: I have already stated under the third reason, the constitutional ground, which I again reiterate to the Court. That is, that it violates the provision that citizens of each state shall be entitled to the privileges and immunities of the citizens of the several states. That point was

argued to your Honor in the motion to quash, and I here repeat it, with the same line of reasoning.

The Court: Do you desire a ruling on that point at this time?

Mr. Greis: Yes.

The Court: Well, I will deny your motion.

(To which ruling the defendants, by their counsel pray [fol. 159] a bill of exceptions, which is hereby allowed and sealed accordingly.

Palmer M. Way, P. J. (Seal.)

Mr. Greis: I further move, your Honor for a direction of a verdict upon each of the several constitutional grounds that were named and argued in the motion to quash, namely, that the state violates—the statute and the indictment under it violate the Thirteenth Amendment of the United States Constitution providing against servitude; and the Fourteenth Amendment to the Federal Constitution which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States or of any state, deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

And also under Article I, Section 1 of the New Jersey Constitution, which provides natural and unalienable rights of enjoying and defending life and liberty, acquiring, possession and protecting property, and pursuing and obtaining safety and happiness.

And also that it is a violation of the New Jersey Constitution, Article I, Section 18, providing that people have the right freely to assemble together, to consult for the common good.

And also that it violates Article IV, Section 7, paragraph 3, of the State Constitution in New Jersey, which provides [fols. 160-227] that the Legislature shall not pass any bill of attainder or ex post facto law.

And also that it violates Article IV, Section 7, paragraph 4, of the New Jersey State Constitution, that every law shall embrace but one object and that shall be expressed in the title, et cetera.

I think that is all, if your Honor please.

The Court: I will deny your motion on those grounds, Mr. Greis, and your exception will be noted, of course.

Mr. Greis: Yes.

(To which ruling the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.

Palmer M. Way, P. J. (Seal.)

[fol. 228] COURT'S CHARGE TO THE JURY

WAY, J.:

Ladies and gentlemen of the jury: The State of New Jersey has by action of the Grand Jury of this County charged these three defendants, namely, Frank Pius, alias Frank Lanzetta, alias Ignatius Lanzetta, alias Ignatius Lanzetto, alias Ignatius A. Lanzetti, and Michael Falcone, alias Mickey Britt, and Louis Del Rossi, alias Fattie Louie, with crime—charged them with crime, which crime was alleged to have been committed on the 12th, 16th, 19th and 24th days of July of this year, 1936, in the Borough of Wildwood Crest of this County, and generally within the jurisdiction of this Court.

Now this accusation so made by the Grand Jury does not in itself mean that the defendants or either of them are guilty of the crime so charged. Each of the defendants have plead not guilty. They have plead separately to the charges that have been allotted against them and by so doing have created an issue in each instance, which issues are now being tried in this court together, in order to determine the truth or the falsity of the charges which have been made against them. And from the testimony that has been adduced by the State and by the defense you are to decide whether the defendants or either of them are guilty or not guilty.

[fol. 229] Thus, ladies and gentlemen, your part in this trial is of the utmost importance. Under the law, you and you alone are the sole judges of the facts and all questions of fact that come up in this trial. You are to decide and to settle who is telling the truth upon the witness stand, and you are to give the weight to the testimony or parts of the testimony as you in your sound judgment think

should be given to it or any part of it. You have had the opportunity to note the demeanor of the witnesses as they have been presented to you for testimony and as they have testified.

Now my part in this trial has been to see to it that only proper and legal evidence or testimony should be given to you for consideration—for consideration after you retire. This, of course, I have tried to do, and I shall now not comment on the testimony or upon the evidence that has come from the witnesses' lips, as your memory concerning it is perhaps as good or maybe better than mine, and anything that I might say concerning it would probably tend to confuse you because, after all, as I have said and as has been indicated in the argument, you are the sole judge of the facts.

Now, it has been stated, too, in the argument, and I think perhaps it is well worth going over from the standpoint of the Court, that our State by an act of its Legislature did supplement our Crimes Act in 1934, and it was supplemented under Chapter Laws, 1934, Chapter 155, at page 394. It has been read to you, I believe, by counsel either [fol. 230] in their arguments or their openings, but now that I am giving you the instructions—about to give you the instructions, I think perhaps that I should go over it again and restate to you the part of that chapter that we are working under—that these defendants have been charged under.

Section 1 has a bearing upon this charge, and it reads:

"A gangster is hereby declared to be an enemy of the State."

Section 2 and Section 3 we are not concerned in, because the charge has not been brought under those sections.

But the charge has been brought under Section 4 of the Act, and that reads:

"Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State, is declared to be a gangster, providing, however, that nothing in this Section shall in any wise be construed to include any participant or sympathizer in any labor dispute."

Of course, that is a proviso that does not in any way concern us.

[fol. 231] Section 5 provides in general that any person convicted of being a gangster under the provisions of this Act shall be guilty of a high misdemeanor.

Now as to the punishment under this Act, if there is no guilt, if you so find it, obviously there would be no punishment. If there is, on the other hand, guilt, then the subject of punishment rests entirely with the Court.

As I have stated, the defendants have each been accused of the crime so described, and now that they have been so accused there is a presumption of innocence in favor of these defendants throughout the trial, and the defendants are presumed to be innocent until the State has established their guilt beyond a reasonable doubt. And a reasonable doubt has been defined to be not a mere possible doubt, but it is that state of the case which, after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. That is a definition that is given to us in law. So, ladies and gentlemen, the State must prove to your satisfaction beyond a reasonable doubt that the defendants at bar, Frank Pius, alias as I have indicated, the Lanzetti defendant, and Michael Falcone, alias as I have indicated him, and Louis Del Rossie, as I have indicated him—I repeat that the proofs must be to the extent as I have indicated.

They must also prove under the elements which are set [fol. 232] up under the Act, first, that these defendants, each of them, had no lawful occupation and, second, that they were known to be members of a gang consisting of two or more persons; third, that they were convicted at least three times of being a disorderly person or that they were convicted of crime in this or in any other state. You have heard this testimony. As I have said before, I am leaving the inferences to you.

Now if the State has established these charges or these elements as I have indicated, and by evidence beyond a reasonable doubt, then it becomes your duty to convict such person or persons as is here accused or charged. If, on the other hand, you are not satisfied to the extent that I have indicated it is then in the course of your duty to acquit

such person or persons as accused or charged. This case now rests with you to determine the guilt or the innocence of each of these defendants, and that you will indicate upon your return of your verdict. That is to say, you will find the guilt or innocence in connection with each of the defendants separately when your verdict is returned.

I have been requested on the part of the defense to charge you somewhat at length, and I shall charge you in accordance with the requests that have been made, with such modifications as I shall indicate.

First. If the State has not proven to you beyond a reasonable doubt that Ignatius Lanzetti was not engaged in [fol. 233] a lawful occupation on July 12, 16, 19 and 24 of this year, 1936, the dates laid down in the indictment, then you must return a verdict of not guilty as to Ignatius Lanzetti.

I charge you the same as to Michael Falcone, and the same as to Louis Del Rossi.

The next one: If the State has not proven to you beyond a reasonable doubt that a gang generally and commonly known as the Lanzetti gang was in existence on the dates laid in the indictment—that is, July 12th, 16th, 19th and 24th of this year, then you must return a verdict of not guilty as to all defendants.

If the State has not proven to you beyond a reasonable doubt that any of these defendants were members of a gang generally and commonly known as the Lanzetti gang, then you must acquit those against whom the State has not satisfied you beyond a reasonable doubt.

I have been asked to define reasonable doubt, which I have already done. As a matter of fact, my general charge covered many of these things that will appear in these special requests.

This is another charge: As to Louis Del Rossi, the testimony is that he was walking with his wife. I charge you that standing alone, without any other circumstances involved, that is a lawful act.

[fol. 234] As to Michael Falcone, the testimony is that he was entering a car occupied by a young lady. I charge you that standing alone, without any other circumstances involved, that is a lawful act.

As to Ignatius Lanzetti: Being at home on July 24, 1936, with his family is in itself a lawful occupation, and I charge you that it is in itself a lawful act.

Next charge: There is no evidence before you that any of the defendants were in this state on July 16th, 1936, one of the dates laid in the indictment, and you can disregard that date entirely.

Next charge: The laws of the State of New Jersey do not require anyone to pursue an occupation on the Sabbath and it is common knowledge and the Court takes notice that July 12th and 19th were Sundays and the defendants were not obliged to pursue an occupation on those dates.

I refuse to charge the rest as written, as the statement is too broad.

Next charge: The defendants are charged with a criminal offense. Fundamentally a crime is an act of commission or omission, but the offense charged must be specific and certain and established by the State by clear, convincing testimony beyond a reasonable doubt.

Next charge: If the State has failed to establish by competent evidence that defendants committed an act of omis- [fol. 235] sion or commission prohibited by law against the State, you must return a verdict of not guilty.

Next charge: The State is relying wholly on circumstantial evidence to establish that defendants were known to be members of a gang on the dates charged in the indictment. Circumstantial evidence relied upon must be such as to exclude the hypothesis of innocence. The inferences to be found from such facts must be consistent with guilt and with guilt alone.

Next charge: Although the indictment is joint and includes all three defendants, you may acquit one, two or all of the defendants if the State has not proven all the elements laid down in the indictment to your satisfaction beyond a reasonable doubt.

Next charge: The burden of proof is upon the State, and the burden is never upon the defendant. If the State fails to carry the burden of proof, you must return a verdict of not guilty.

The State has requested me one charge to make:

Where the defendants make no effort to take the stand to testify each for himself on his own behalf, I want to say to you that if facts are testified to which concern the acts of the defendant, which could be by his oath denied, his failure to

[fols. 236-240] testify in his own behalf raises a strong presumption that he cannot truthfully deny them.

I so charge.

Now you may take the jury and retire. Everybody remain seated while the jury leaves.

Mr. Greis: I take a general exception to the charge.

The Court: Exception will be noted.

(To which ruling the defendants, by their counsel, pray a bill of exceptions, which is hereby allowed and sealed accordingly.

Palmer M. Way, P. J. (Seal.)

[fol. 241] In Court of Errors and Appeals of New Jersey

The State, Defendant-in-Error,

v.

Frank Pius, Alias, etc., et als., Plaintiffs-in-Error

On Error to the New Jersey Supreme Court

Assignments of Error

And now, on this — day of October, 1937, comes the defendants, by James Mercer Davis, Esq., their Attorney, and say that in the record and proceedings aforesaid, and also in the matters recited and contained in the judgment thereon, as aforesaid, there is manifest error in this, to wit:

1. Because the Court below adjudged that Chapter 155 of P. L. 1934 of New Jersey, does not violate the provisions of the Constitution of the United States guaranteeing due process of law as set forth in the fifth and fourteenth amendments of the Federal Constitution.

2. Because the learned Court below adjudged that the defendants had not been subjected to double jeopardy.

[fol. 242] 3. Because the learned Court below adjudged that Chapter 155 of P. L. 1934, was not an ex post facto law.

4. Because the learned Court below affirmed the judgment of conviction of the Cape May Quarter Sessions Court.

James Mercer Davis, Of Counsel with the Plaintiffs-in-Error.

IN COURT OF ERRORS AND APPEALS OF NEW JERSEY

WRIT OF ERROR

THE STATE OF NEW JERSEY, ss:

(L. S.)

The State of New Jersey to the Chief Justice and other Justices of the Supreme Court of Judicature of the State of New Jersey, Greeting:

Because in the indictment, record and proceedings, and also in giving judgment upon certain indictments against Frank Pious, alias Ignatius Lanzetta, Michael Falcone and Louis Del Rossi, upon charges of being enemies of the State and gangsters, and with violations of the provisions of the Statute which is Chapter 155, Laws of 1934, of the State of New Jersey, in the Borough of Wildwood, County of Cape May and State of New Jersey, which was in our Supreme Court of Judicature, before you, between the State of New Jersey and the said defendants, manifest error hath inter- [fols. 243-244] vened to the great damage of the said Frank Pious, alias Ignatius Lanzetta, Michael Falcone and Louis Del Rossi, defendants in said indictment, as by their complaint we are informed; we being willing that the error, if any there be, should in due manner, be corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send, under your hand and seal, the indictment, record and proceedings with all things touching and concerning the same, to our Court of Errors and Appeals in the last resort in all causes, at Trenton, on the eighteenth day of October next, together with this writ, that the indictment, record and proceedings, etc., being inspected we may cause to be done thereupon, for correcting that error, what of right and according to the law and custom of the State of New Jersey ought to be done.

Witness our Chancellor and President Judge of our said Court of Errors and Appeals at Trenton the 28th day of September, 1937.

Thomas A. Mathis, Clerk.

James Mercer Davis, Attorney.

[fol. 245] In Supreme Court of New Jersey, No. 5, May Term, 1937

The State, Defendant-in-Error,

v.

Frank Pius, Alias, etc., et als., Plaintiffs-in-Error

Argued May 5, 1937. Decided —— —, 1937

1. Alleged errors of law at a criminal trial, not brought up by suitable assignments of error, will not be considered in review.

2. An assignment of error that the verdict below was contrary to the charge of the Court, points out no judicial action for review.

3. Supplement to the Crimes Act, Chapter 155 of P. L. 1934, held not unconstitutional on any ground argued in this case.

Error to Cape May Quarter Sessions.

[fol. 246] Before Brogan, Chief Justice, and Justices Trenchard and Parker

For the plaintiffs-in-error: George R. Greis and Andrew Cafiero.

For the State: French D. Loveland, Prosecutor of the Pleas, and Herbert F. Campbell, assistant prosecutor.

Opinion—Filed May 18, 1937

The opinion of the Court was delivered by

Parker, J.:

The three defendants were convicted as "gangsters" under an indictment based on Section 4 of Chapter 155 of the Laws of 1934 (P. L., page 394). The section provides that "any person, not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who was been convicted of any crime, in this or in any other State, is declared to be a gangster;" with a proviso not here applicable. Section 5 provides as to the penalty: "Any person convicted of being a gangster

under the provisions of this act shall be guilty of a high misdemeanor, and shall be punished by a fine not exceeding $10,000, or imprisonment not exceeding twenty years, or both."

The case is before us on strict writ of error only and is of course considered in that aspect. The first principal ground [fol. 247] for reversal now urged is based on the fourth assignment of error, that the Court refused to direct an acquittal when so moved. This motion was made when the State rested, and again at the conclusion of all the evidence. In the first case the granting or denial of the motion was discretionary, and not reviewable on strict writ of error. Burnett v. State, 62 N. J. Law, 510; State v. Jaggers, 71 Id. 281, 283; State v. Metzger, 82 Id. 749. But the same reasons were invoked at the conclusion of the evidence. Those now argued are: 1. Failure to prove the existence of a "gang" at the time laid in the indictment. There was evidence for the jury on that point. With its weight we are not now concerned. 2. Failure to prove that defendants were known to be members of such alleged "gang." There was similar proof on that point also; as also: 3. That they were not engaged in any lawful occupation at the times laid in the indictment. The argument here is that the point is covered only by oral statements of the defendants at or shortly after the time of arrest, which were objected to and admitted over exception. But these rulings are not assigned as error, and therefore require no consideration at this time. 4. That four dates were charged in the indictment, and three were excluded from the consideration of the jury: hence, a general verdict of guilty was contrary to the charge of the Court. But if the conditions of the statute were met on one date, the crime was complete. Moreover, the assignment of error covering this point, that "the verdict was contrary to the Court's charge and contrary to the evidence" fails to point out any ruling by the Court.

[fols. 248-249] The second main point is that Chapter 155 of P. L. 1934 is unconstitutional. For this four grounds are specified. Two are substantially the same, viz. due process of law, guaranteed by the fifth and fourteenth amendments of the Federal Constitution. As to these, we are content to rest on the very recent decision of this Court in State v. Bell, 15 Misc. 109, 188 Atl. 757. "Double jeopardy" is claimed; but no prior conviction or indictment was even suggested. It will be time enough to take up this point when

there is a second indictment for the same offense. Further it is specified in the brief that "the vagueness and indefiniteness of the act would create concurrent jurisdiction in every county in the State." No doubt such concurrent jurisdiction would exist in every county where the act is violated; as indeed it should exist. Finally, that the act is ex post facto in this case because the Pennsylvania convictions of crime that were proved as an element of the present statutory offence took place some years ago. But the statute is not aimed at punishing convicted criminals because they are convicted criminals, but because, being such, they become members of a gang organized to plot and commit further crimes, and neglect or refuse to engage in any lawful occupation. The act is therefore predicated on two present and voluntary acts of the party, both of which must concur: voluntary membership in a gang; and voluntary abstention from work. We see no ex post facto legislation here.

Finding no legal error properly laid before us under this writ, the judgment of conviction is affirmed.

[fol. 250] In Court of Errors and Appeals of New Jersey

The State of New Jersey, Defendant-in-Error,

vs.

Frank Pius, Alias Ignatius Lanzetta, Michael Falcone, and Louie Del Rossi, Plaintiffs-in-Error

On Writ of Error

Order of Affirmance

This cause having been duly submitted at the January Term, 1938, of this court, upon the briefs of James Mercer Davis, Esq., of counsel with plaintiffs-in-error, and French B. Loveland, Esq., Prosecutor of the Pleas, of counsel with defendant-in-error, and the court having considered the same, and finding no error in the record or proceedings in the Supreme Court.

It is, Thereupon, on this 29th day of April, in the year of our Lord, one thousand, nine hundred and thirty-eight, Ordered and Adjudged that the judgment of the Supreme Court in this cause be affirmed.

On motion of: Herbert F. Campbell, Assistant Prosecutor, of counsel with defendant-in-error.

[fol. 251] Filed Aug. 25, 1938. Thomas A. Mathis, Clerk.

[fols. 252-256] In Court of Errors and Appeals of New Jersey, No. 15, February Term, 1938

State of New Jersey, Defendant-in-Error,

v.

Frank Pius, Alias Ignatius Lanzetta, Michael Falcone and Louie Del Rossi, Plaintiffs-in-Error

Submitted —— — ——. Decided April 29, 1938

On error to the Supreme Court, whose opinion is reported in 118 N. J. L. 212, 192 Atl. 89.

For plaintiffs-in-error; James Mercer Davis, Samuel Kagle and Carl Kisselman.

For defendant-in-error; French B. Loveland, prosecutor of the pleas, Herbert F. Campbell, assistant prosecutor of the pleas.

Opinion—Filed April 29, 1938

Per Curiam:

We are in full accord with the reasoning and result reached by the Supreme Court. We desire merely to mark the fact that the case of State v. Bell, 15 N. J. Mis. R. 109, 188 Atl. 737, relied upon by the court below as dispositive of the contentions that our Gangster act (1 Rev. Stat. (1937) 2:136-4 (Ch. 155, P. L. 1934, p. 794) trenches upon both federal and state constitutional inhibitions, has recently been affirmed by this court sub nomine State v. Gaynor, 119 N. J. L. 582, 197 Atl. 360.

Accordingly, the judgment under review is affirmed with costs.

[File endorsement omitted.]

[fol. 257] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 20, 1938

The appellants in the above entitled suit, and each of them, having prayed for the allowance of an Appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Court of Errors and Appeals of the State of New Jersey on the 29th day of April, 1938 and from each and every part thereof, and having presented and filed their Petition for Appeal, Assignments of Error and Prayer for Reversal, pursuant to the Statute and Rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an Appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the judgment of the New Jersey Court of Errors and Appeals in this cause as provided by law;

[fol. 258] And it is further ordered that the Clerk of the Court appealed from shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within forty days of this date.

And it is further ordered that security for costs on Appeal be fixed in the sum of $100.

Dated at Philadelphia, Pennsylvania, this 15th day of July, 1938.

Owen J. Roberts, Associate Justice of the Supreme Court of the United States.

[File endorsement omitted.]

[fol. 259] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR AND PRAYER FOR REVERSAL—Filed July 15, 1938

Comes now the appellants, Ignatius Lanzetta, Michael Falcone and Louie Del Rossi, and in connection with their petition for an appeal, say that there are errors in the record and proceedings in the above entitled case and for the

purpose of having the same reviewed in the Supreme Court of the United States from the final judgment of the New Jersey Court of Errors and Appeals entered on April 29, 1938.

First. Said New Jersey Court of Errors and Appeals erred in giving final judgment affirming the judgment of the Supreme Court of New Jersey holding that Chapter 155 P. L. 1934 is a Constitutional act.

[fol. 260] Second. Said New Jersey Court of Errors and Appeals erred in failing to acquit and discharge the defendants-appellants of the charges set out in the indictment, to wit, being gangsters in violation of Section 4 of Chapter 155 of the Laws of 1934 (P. L. page 394).

Third. Said New Jersey Court of Errors and Appeals erred in failing to hold that Section 4 of Chapter 155 P. L. 1934 violates the Fourteenth Amendment of the Federal Constitution in that it denies due process of law.

Fourth. Said New Jersey Court of Errors and Appeals erred in failing to hold that Section 4 of Chapter 155 of the Laws of 1934 is in violation of defendant-appellants privileges and immunities as citizens of the United States, which privileges and immunities are guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Fifth. Said New Jersey Court of Errors and Appeals erred in failing to hold that Section 4 of Chapter 155 of Laws of 1934 violated the 10th Section of Article 1 of the Constitution of the United States.

Sixth. Said New Jersey Court of Errors and Appeals erred in entering the following Final order and judgment, "Accordingly the judgment under review is affirmed with costs."

Prayer for Reversal

Wherefore, the defendants-appellants pray that said final judgment of the New Jersey Court of Errors and Appeals dated April 29, 1938, affirming the conviction of the defendants-appellants having violated the Gangster Act of 1934 be reversed; that the New Jersey Court of Errors and Appeals be directed to vacate said judgment; that said New Jersey Court of Errors and Appeals be directed to acquit [fols. 261-267] defendants-appellants of the charge set out

in the indictment and to order that they be discharged and released forthwith; and that all the proper relief be granted to defendants-appellants.

Dated at Philadelphia, Pennsylvania, this 15th day of July, 1938.

The Defendants-Appellants, Ignatius Lanzetta, Michael Falcone and Louie Del Rossi by Harry A. Mackey, George C. Klauder and Samuel Kagle, their attorneys.

Samuel Kagle. George C. Klauder. Harry A. Mackey.

Endorsed: "Filed Jul. 20, 1938. Thomas A. Mathis, Clerk."

[fol. 268] In Supreme Court of the United States

Statement of Points to be Relied upon and Parts of the Record Necessary for Consideration Thereof—Filed August 31, 1938

Points to be Relied Upon

The points on which appellant intends to rely are as follows:

1. That the "Gangster Law of New Jersey", Chapter 155 of P. L. 1934, Page 794, is repugnant to the Constitution of the United States in that (1) It violates Section 10 of Article 1 which prohibits the States from passing ex post facto laws; (2) It violates the Fourteenth Amendment to the Federal Constitution in that it denies due process of law; and (3) It violates the privileges and immunities as citizens of the United States, which privileges and immunities are guaranteed by Section 1 of the Fourteenth Amendment to the Constitution.

[fol. 269] Parts of the Record Necessary for Consideration of the Points Relied Upon

Appellants believe the following portions of the record (State of Case) are necessary to be printed for the consideration of said points:

Assignments of Error in the New Jersey Supreme Court (State of Case, pp. 1 to 3).

Writ of Error (State of Case, pp. 4, 5).

Judgment Record (State of Case, pp. 6 to 15 inc.).

Motion to Quash Indictment (State of Case, pp. 16 to 25 inc.).

Testimony of Sargeant William P. Kelly (State of Case, pp. 52 to 67 inc.).

Testimony of Detective Frank Ruggerio (State of Case, pp. 67 to 70 inc.).

Testimony of Corporal A. J. Waldringer (State of Case, pp. 70, 71).

Testimony of Captain James P. Ryan (State of Case, pp. 72 to 93 inc.).

Testimony of John J. Creedon (State of Case, pp. 93 to 100 inc.).

Testimony of Francis J. Dunn (State of Case, pp. 105 to 115 inc.).

Testimony of Charles Steinberg (State of Case, pp. 118 to 124 inc.).

Testimony of George Muhs (State of Case, pp. 132 to 138 inc.).

Defendant's Motion for Dismissal (State of Case, pp. 151 to 160 inc.).

Court's Charge to Jury (State of Case, pp. 228 to 236 inc.).

Assignments of Error and Writ of Error—Court of Errors and Appeals (State of Case, pp. 241 to 243 inc.).

Opinion of the New Jersey Supreme Court (State of Case, pp. 245 to 248 inc.).

Opinion of Court of New Jersey Errors and Appeals appended to the State of Case.

Respectfully submitted, Harry A. Mackey, Samuel Kagle, George C. Klauder, Attorneys for Appellants.

[fol. 270] [File endorsement omitted.]

Endorsed on cover: File No. 42,793. New Jersey Court of Errors and Appeals. Term No. 308. Ignatius Lanzetta, Michael Falcone and Louie Del Rossi, appellants, vs. The State of New Jersey. Filed August 30, 1938. Term. No. 308, O. T., 1938.

[redacted]

No. [redacted]

[redacted]

FRANK PIECE, [redacted] IGNATIUS LANZETTA, MICHAEL FALCONE and LOUIS DEL GIUDICE,

Appellants,

vs.

THE STATE OF NEW JERSEY,

Respondent.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

STATEMENT AS TO JURISDICTION.

SAMUEL KAGEN,
GEORGE C. KLAUBER,
HARRY A. MACKEY,
Counsel for Appellants.

INDEX.

Subject Index.

	Page
ement as to jurisdiction	1
Statutory provision sustaining jurisdiction	1
Statute of the State of New Jersey the validity of which is involved	2
Date of judgment and of application for appeal	2
Nature of the case	3
Appendix—Opinion of the Court of Errors and Appeals	8

Case Cited.

ms v. *United States*, 217 U. S. 349	7

Statutes Cited.

on of February 13, 1925, Sec. 8(a), Title 28, U. S. . 350, 43 Stat. 936	6
stitution of the United States, Article 1, Section	6
stitution of the United States, Fifth Amendment	6
stitution of the United States, Fourteenth Amendent	6, 7
icial Code, Section 237(a) as amended by the Act February 13, 1925, Chap. 229, 43 Stat. 936	1, 7
s of New Jersey (1934), Chapter 155 (P. L. 394), ec. 4	2, 3
s of New Jersey (1934), Chapter 155 (P. L. 394), ec. 5	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 308

FRANK PIUS, ALIAS IGNATIUS LANZETTA, MICHAEL FALCONE AND LOUIE DEL ROSSI,
Appellants,

vs.

THE STATE OF NEW JERSEY.

STATEMENT AS TO JURISDICTION.

Filed July 15, 1938.

Ignatius Lanzetta, Louie Del Rossi and Michael Falcone, by their attorneys, Samuel Kagle, Harry A. Mackey and George C. Klauder, respectfully submit the following statement in support of the jurisdiction of the United States Supreme Court to review the judgment of the New Jersey Court of Errors and Appeals, on Appeal.

A. The statutory provision sustaining the jurisdiction of the United States Supreme Court is under Section 237 (a) of the Judicial Code, Act of February 13, 1925, Chapter 229, 43 Stat. 936, which reads as follows:

> "SEC. 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the

validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The Writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution, or remand the cause to the court from which it was removed by the writ."

B. The statute of the State of New Jersey involved in this cause is Chapter 155 of the Laws of 1934 (P. L. 394) known as the "Gangster Act", which Statute appellants contended was repugnant to the Constitution of the United States and the final judgment of the New Jersey Court of Errors and Appeals was to sustain the validity of said Estate.

The pertinent sections of Chapter 155 of the Laws of 1934 which are here involved are as follows:

"SECTION 4. Any person not engaged in any lawful occupation, known to be a member of any gang, consisting of two or more persons, who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in this or in any other State, is declared to be a gangster."

(A proviso clause is omitted because it is not pertinent.)

"SECTION 5. Any person convicted of being a gangster under the provisions of this Act shall be guilty of a high misdemeanor and shall be punished by fine not exceeding $10,000.00 or imprisonment not exceeding twenty years, or both."

C. The date of judgment of the New Jersey Court of Errors and Appeals was April 29, 1938, and the date when application for appeal was presented is July 15, 1938.

Nature of Case.

The three defendants were convicted as "gangsters" under an Indictment based on Section 4 of Chapter 155 of the Laws of 1934 (P. L. page 394).

The Section provided,

> "Any person not engaged in any lawful occupation, known to be a member of any gang, consisting of two or more persons, who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in this or in any other state, is declared to be a gangster."

The fifth Section of said Statute provides that upon conviction such person shall be guilty of a high misdemeanor and shall be punished by fine not exceeding $10,000.00 or imprisonment not exceeding twenty years, or both.

The defendants were sentenced by the Court of Quarter Sessions of Cape May County to a term of imprisonment of not less than five years nor more than ten upon a verdict of the jury which was, "Guilty, with recommendation to the Court for mercy".

During June of 1936 Ignatius Lanzetta, a resident of Philadelphia and a citizen of Pennsylvania, rented a summer home in Wildwood Crest, New Jersey, a vacation resort. This home was occupied by Lanzetta and his family and Del Rossi and his family. During July, Michael Falcone, the other defendant, visited the Lanzettas. He was a brother to the wife of William Lanzetta.

On July 24, 1936, Ignatius Lanzetta was arrested while he was reading in his home. Louis Del Rossi was arrested on the street while he was walking with his wife. Michael Falcone was arrested while he was seated in a parked automobile. These arrests were without warrant. When the defendants were taken into custody by the police, they were not charged with crime but on the following day

warrants were issued charging them with violation of the Gangster Law of 1934. It was not charged or proved that these men ever committed any criminal offense in the State of New Jersey nor were they charged or shown to have been guilty of any disorderly conduct and so far as the evidence is concerned each of the defendants were shown to have been a well behaved person at all times within the State of New Jersey.

The State obtained a conviction on evidence showing (1) that the defendants were convicted of crime in Pennsylvania prior to the passage of the Gangster Law of 1934, (2) that they were "known" to the Philadelphia police to be members of the Lanzetta gang which operated in Philadelphia, Pennsylvania, and (3) that they were not engaged in lawful occupation at the time of their arrest.

The constitutional objections to the validity of such statute were raised in the Cape May County Quarter Sessions Court in the first instance by a motion to quash indictment (State of Case, pages 16, 18, 19). The Court of Quarter Sessions, after argument, denied said motion to quash and exception was granted thereto (State of Case, page 24).

Upon Appeal to the New Jersey Supreme Court, an Appellate Court of first resort, said constitutional objections were raised in the assignments of error and argued on Appeal (*Vide* State of Case, pages 1 and 2).

The Opinion of the Supreme Court in a decision by Parker, J., which considers and refers to such constitutional objections raised by petitioners appears in the State of Case at pages 246, 247 and 248 and the pertinent portion thereof is as follows:

> "The second main point is that Chapter 155 of P. L. 1934 is unconstitutional. For this four grounds are specified. Two are substantially the same, viz. due process of law, guaranteed by the fifth and fourteenth

amendments of the Federal Constitution. As to these, we are content to rest on the very recent decision of this Court in State *v.* Bell, 15 Misc. 109, 188 Atl. 757. 'Double jeopardy' is claimed; but no prior conviction or indictment was even suggested. It will be time enough to take up this point when there is a second indictment for the same offense. Further it is specified in the brief that 'the vagueness and indefiniteness of the act would create concurrent jurisdiction in every county in the State.' No doubt such concurrent jurisdiction would exist in every county where the act is violated; as indeed it should exist. Finally, that the act is ex post facto in this case because the Pennsylvania convictions of crime that were proved as an element of the present statutory offence took place some years ago. But the statute is not aimed at punishing convicted criminals because they are convicted criminals, but because, being such, they become members of a gang organized to plot and commit further crimes, and neglect or refuse to engage in any lawful occupation. The act is therefore predicated on two present and voluntary acts of the party, both of which must concur: voluntary membership in a gang; and voluntary abstention from work. We see no ex post facto legislation here.

"Finding no legal error properly laid before us under this writ, the judgment of conviction is affirmed."

These constitutional objections were again raised in the New Jersey Court of Errors and Appeals (*Vide* State of Case, pages 241 and 242). Said Court of Errors and Appeals, in a *per curiam* opinion filed April 29, 1938, stated,

"We are in full accord with the reasoning and result reached by the Supreme Court. We desire merely to mark the fact that the case of State *v.* Bell, 15 N. J. Mis. R. 109, 188 Atl. 737, relied upon by the court below as dispositive of the contentions that our Gangster Act (1 Rev. Stat. (1937) 2:136-4 (Ch. 155, P. L. 1934, p. 794), trenches upon both Federal and State constitu-

tional inhibitions, has recently been affirmed by this court sub nomine State *v.* Gaynor, 119 N. J. L. 582, 197 Atl. 360.

Accordingly, the judgment under review is affirmed with costs."

The opinion of the Supreme Court is officially reported in 118 N. J. L. 212, 192 Atl. 89. The opinion of the Court of Errors and Appeals is reported in 120 N. J. L. 189.

The question involved in this appeal is of a substantial nature and if the contentions of appellants are upheld they will be relieved of completing a sentence of not less than five years or more than ten years at hard labor in the State Penitentiary. The question involved is whether said Statute of New Jersey, under which defendants were convicted and sentenced, violates Section 10 of Article 1 of the Constitution of the United States which prohibits States from passing *ex post facto* laws and also whether it violates the due process of law and the privileges and immunities guaranteed to the citizens of the United States by the Fifth and Fourteenth Amendments to the Federal Constitution.

It is respectfully submitted that this application for appeal is timely in that it is taken within three months after the entry of the final judgment of the New Jersey Court of Errors and Appeals, as provided by Section 8 (a) of the Act of Congress of February 13, 1925 (U. S. Code, Title 28, Section 350, 43 Stat. L. 936), which provides, *inter alia:*

> "That no writ of error, appeal or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree. * * *"

In this case, the final judgment sought to be reviewed was entered on April 29, 1938, and the application for appeal

was filed on July 13, 1938; said application was denied by Chancellor Luther A. Campbell, as more fully appears in the application for appeal which was presented to this Honorable Court.

The New Jersey Court of Errors and Appeals is the highest Appellate Court in said State and the decision of the Court is final in all respects.

The jurisdiction of the United States Supreme Court to review this case is expressly conferred by Section 237 (a) of the Judicial Code hereinabove recited.

We respectfully submit, therefore, that in a criminal proceeding where the personal liberty of citizens is involved questions of paramount and most substantial importance are presented. *Weems* v. *United States*, 217 U. S. 349, 362, 30 S. Ct. 544, 54 L. Ed. 793.

We therefore most respectfully submit that the Gangster Act of New Jersey is repugnant to the Constitution of the United States in that (1) it violates Section 10 of Article 1 which prohibits the States from passing *ex post facto* laws, (2) it violates the Fourteenth Amendment to the Federal Constitution in that it denies due process of law and (3) it violates the privileges and immunities as citizens of the United States, which privileges and immunities are guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States; and it is further urged that the Supreme Court of United States under Section 237 (a) of the Judicial Code has jurisdiction to review and decide this case upon Appeal.

Respectfully submitted,

Samuel Kagle.
George C. Klauder.
Harry C. Mackey.

APPENDIX.

COURT OF ERRORS AND APPEALS.

FEBRUARY TERM, 1938.

No. 15.

STATE OF NEW JERSEY, *Defendant-in-Error,*

v.

FRANK PIUS, Alias IGNATIUS LANZETTA, MICHAEL FALCONE and LOUIE DEL ROSSI, *Plaintiffs-in-Error.*

Submitted —— —, ——. Decided April 29, 1938.

On error to the Supreme Court, whose opinion is reported in 118 N. J. L. 212, 192 Atl. 89.

For plaintiffs-in-error; James Mercer Davis, Samuel Kagle and Carl Kisselman.

For defendant-in-error; French B. Loveland, prosecutor of the pleas, Herbert F. Campbell, assistant prosecutor of the pleas.

Per CURIAM:

We are in full accord with the reasoning and result reached by the Supreme Court. We desire merely to mark the fact that the case of State *v.* Bell, 15 N. J. Mis. R. 109, 188 Atl. 737, relied upon by the court below as dispositive of the contentions that our Gangster act (1 Rev. Stat. (1937) 2:136-4 (Ch. 155, P. L. 1934, p. 794) trenches upon both federal and state constitutional inhibitions, has recently been affirmed by this court sub nomine State *v.* Gaynor, 119 N. J. L. 582, 197 Atl. 360.

Accordingly, the judgment under review is affirmed with costs.

Endorsed: "Filed Apr. 29, 1938. Thomas A. Mathis, Clerk."

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 308

FRANK PIUS, ALIAS IGNATIUS LANZETTA,
MICHAEL FALCONE AND LOUIE DEL ROSSI,
Appellants,

vs.

THE STATE OF NEW JERSEY.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF OF APPELLANTS.

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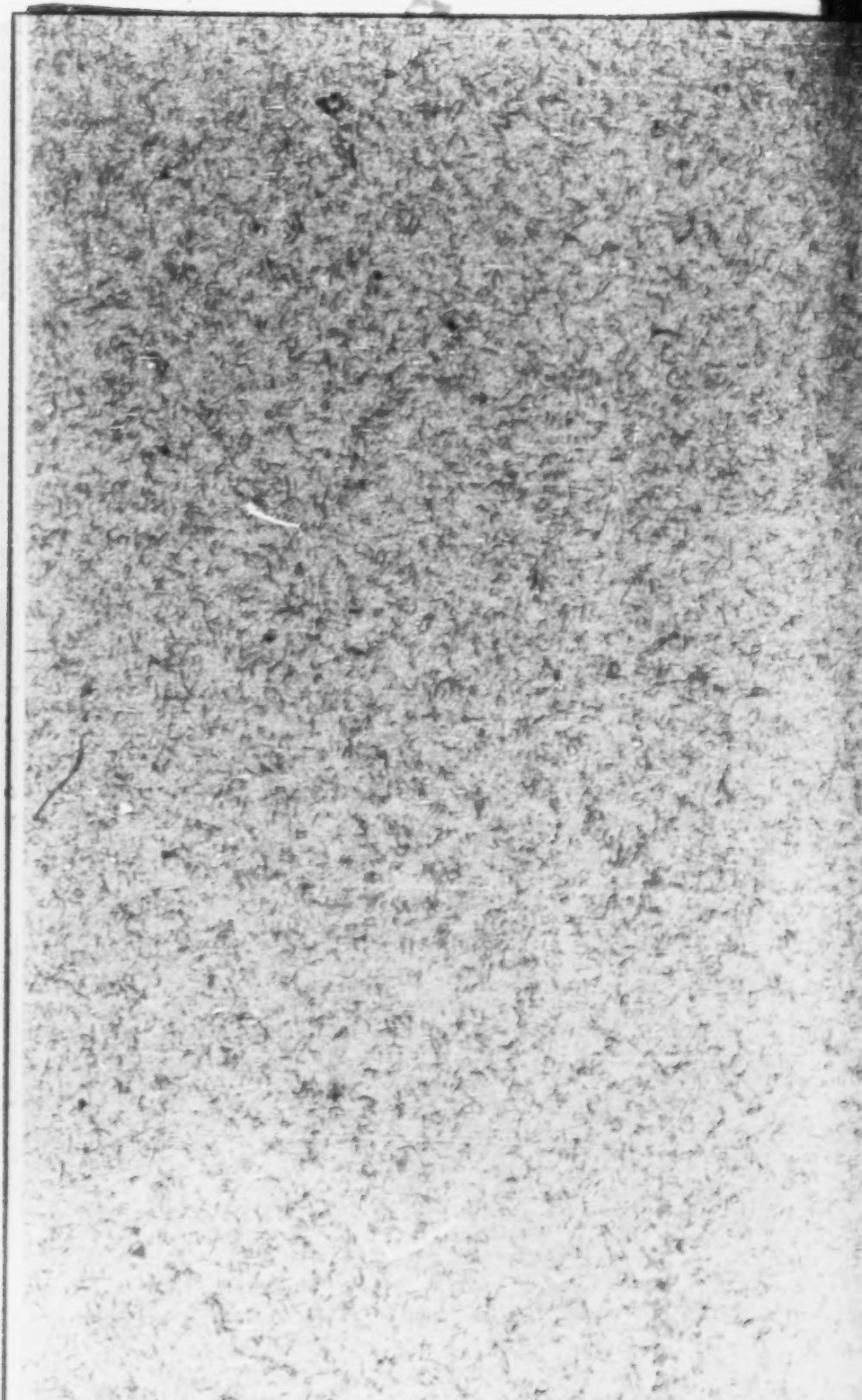

INDEX.

Subject Index.

	Page
Opinions of the courts below	1
Jurisdiction	2
Statement of the case	2
Specifications of error	6
Argument	7
Summary of argument	7
Point A—The statute is invalid because it violates the due process clause of the Constitution	7
B—The statute denies the equal protection of the laws	22
C—The act is ex post facto	25
Conclusion	30

Table of Cases Cited.

American Ins. Co. v. *Canter*, 1 Pet. 511, 7 L. Ed. 242	23
Barney v. *Baltimore City*, 6 Wall. 280, 18 L. Ed. 825	23
Calder v. *Bull*, 3 Dall. 386, 1 L. Ed. 648	26
Connolly, Comm'r, v. *General Construction Co.*, 269 U. S. 385, 70 L. Ed. 322	10, 16
DeJonge v. *State of Oregon*, 299 U. S. 353, 81 L. Ed. 278	17
Garland, Ex parte, 71 U. S. 333, 18 L. Ed. 366	27
Goodman v. *Kinkle*, 77 F. (2d) 623	9
Graham v. *West Virginia*, 224 U. S. 613, 56 L. Ed. 917	30
Herndon v. *Lowry*, 301 U. S. 242, 81 L. Ed. 1066	19
Hepburn v. *Ellzy*, 2 Cr. 445, 2 L. Ed. 332	23
Jachne v. *New York*, 128 U. S. 189, 32 L. Ed. 398	26
McDonald v. *Massachusetts*, 180 U. S. 311, 45 L. Ed. 542	28
McPherson v. *Blacker*, 146 U. S. 1, 36 L. Ed. 869	22
New Orleans v. *Winter*, 1 Wheat. 91, 4 L. Ed. 44	23
People v. *Belcastro*, 356 Ill. 144, 190 N. E. 301	11

Page

Reilly v. *Lamar*, 2 Cr. 344, 2 L. Ed. 300 23
United States v. *Armstrong*, 265 Fed. 683 13
United States v. *Capital Traction Co.*, 34 App. D. C. 592, 18 Ann. Cas. 68 15
United States v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516 ..... 10, 16
Yick Wo v. *Hopkins*, 118 U. S. 356, 30 L. Ed. 220 22

STATUTES CITED.

Constitution of the United States, Article 1, Section 10 ..... 6, 25, 30
Constitution of the United States, Fourteenth Amendment 6, 22, 30
Judicial Code, Sec. 237(a), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936 2
Laws of 1934 of the State of New Jersey (P. L. page 394), Sec. 4, Ch. 155 ..... 2, 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 308

FRANK PIUS, ALIAS IGNATIUS LANZETTA, MICHAEL FALCONE AND LOUIE DEL ROSSI,
Appellants,

vs.

THE STATE OF NEW JERSEY.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF OF APPELLANTS.

I.

Opinions of the Courts Below.

The opinion in the Court of Errors and Appeals for the State of New Jersey is officially reported in 120 N. J. L. 189, and appears in the Record on page 72.

The opinion of the Supreme Court of the State of New Jersey is officially reported in 118 N. J. L. 212, 192 Atl. 89, and appears in this Record on pages 69 to 71, inc.

II.

Jurisdiction.

The statutory provision sustaining the jurisdiction of the United States Supreme Court is under Section 237 (a) of the Judicial Code, Act of February 13, 1925, Chapter 229, 43 Stat. 936, which reads as follows:

> "SEC. 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State court, and may, in its discretion, award execution, or remand the cause to the court from which it was removed by the writ."

A more detailed statement as to jurisdiction is omitted in the interest of brevity because Paragraph 1 of Rule 12 has been complied with and a concise statement of the grounds on which the jurisdiction of this Court is invoked, has been filed as provided in said rule.

III.

Statement of the Case.

The three defendants were convicted as "gangsters" under an indictment based on Section 4 of Chapter 155 of the Laws of 1934 (P. L., page 394) of the State of New Jersey.

The Section provided (R. 63):

> "Any person not engaged in any lawful occupation, known to be a member of any gang, consisting of two or more persons, who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in this or in any other state, is declared to be a gangster."

The Fifth Section of said Statute (R. 69, 70) provides that upon conviction such person shall be guilty of a high misdemeanor and shall be punished by fine not exceeding $10,000.00 or imprisonment not exceeding twenty years, or both.

The defendants were sentenced by the Court of Quarter Sessions of Cape May County to a term of imprisonment of not less than five years nor more than ten upon a verdict of the jury which was "guilty, with recommendation to the Court for mercy" (R. 8).

During June of 1936 Ignatius Lanzetta, a resident of Philadelphia and a citizen of Pennsylvania, rented a summer home in Wildwood Crest, New Jersey, a vacation resort. This home was occupied by Lanzetta and his family and Del Rossi and his family. During July, Michael Falcone, the other defendant, visited the Lanzettas. He was a brother to the wife of William Lanzetta, a brother of Ignatius.

On July 24, 1936, Ignatius Lanzetta was arrested while he was reading in his home (R. 66). Louis Del Rossi was arrested on the street while he was walking with his wife (R. 65). Michael Falcone was arrested while he was seated in a parked automobile (R. 65). These arrests were without warrant. When the defendants were taken into custody by the police, they were not charged with crime but on the following day warrants were issued charging them with violation of the Gangster Law of 1934 (R. 23). It was not charged or proved that these men ever committed any crim-

inal offense in the State of New Jersey nor were they charged or shown to have been guilty of any disorderly conduct and so far as the evidence is concerned each of the defendants was shown to have been a well behaved person at all times within the State of New Jersey (R. 65, 66).

While they were in police custody, the defendants were questioned and they gave their respective addresses, each in the City of Philadelphia, State of Pennsylvania, and upon questioning as to their occupations, Lanzetta stated he was a machine fixer. Falcone stated he was a bricklayer and Del Rossi stated he was a chauffeur (R. 19, 20). The Philadelphia Police admitted that there were no criminal charges pending against the defendants in Philadelphia (R. 39).

The State obtained a conviction on evidence showing (1) that the defendants were convicted of crime in Pennsylvania prior to the passage of the Gangster Law of 1934; (2) that they were "known" to the Philadelphia police to be members of the Lanzetta gang which operated in Philadelphia, Pennsylvania, and (3) that they were not engaged in lawful occupation at the time of their arrest.

The constitutional objections to the validity of such statute were raised in the Cape May County Quarter Sessions Court in the first instance by a motion to quash indictment (R. 9). The Court of Quarter Sessions, after argument, denied said motion to quash and exception was granted thereto (R. 14).

Upon appeal to the New Jersey Supreme Court, an Appellate Court of first resort, said constitutional objections were raised in the assignments of error and argued on appeal (R. 1).

The opinion of the Supreme Court in a decision by Parker, J., which considers and refers to such constitutional objections raised by petitioners, appears in the Record at pages 69, 70 and 71, and the pertinent portion thereof is as follows:

"The second main point is that Chapter 155 of P. L. 1934 is unconstitutional. For this four grounds are specified. Two are substantially the same, viz. due process of law, guaranteed by the fifth and fourteenth amendments of the Federal Constitution. As to these, we are content to rest on the very recent decision of this Court in State *v.* Bell, 15 Misc. 109, 188 Atl. 757. 'Double jeopardy' is claimed; but no prior conviction or indictment was even suggested. It will be time enough to take up this point when there is a second indictment for the same offense. Further, it is specified in the brief that 'the vagueness and indefiniteness of the act would create concurrent jurisdiction in every county in the State.' No doubt such concurrent jurisdiction would exist in every county where the act is violated; as indeed it should exist. Finally, that the act is ex post facto in this case because the Pennsylvania convictions of crime that were proved as an element of the present statutory offense, took place some years ago. But the statute is not aimed at punishing convicted criminals because they are convicted criminals, but because, being such, they become members of a gang organized to plot and commit further crimes, and neglect or refuse to engage in any lawful occupation. The act is therefore predicated on two present and voluntary acts of the party, both of which must concur; voluntary membership in a gang; and voluntary abstention from work. We see no *ex post facto* legislation here.

"Finding no legal error properly laid before us under this writ, the judgment of conviction is affirmed."

These constitutional objections were again raised in the New Jersey Court of Errors and Appeals (R. 67). The Court of Errors and Appeals, in a *per curiam* opinion filed April 29, 1938, stated (R. 72):

"We are in full accord with the reasoning and result reached by the Supreme Court. We desire merely to mark the fact that the case of State *v.* Bell, 15 N. J. Mis. R. 109, 188 Atl. 737, relied upon by the court below

as dispositive of the contentions that our Gangster Act (1 Rev. Stat. (1937) 2:136-4 (Ch. 155, P. L. 1934, p. 794), trenches upon both Federal and State constitutional inhibitions, has recently been affirmed by this court *sub nomine* State *v.* Gaynor, 119 N. J. L. 582, 197 Atl. 360.

Accordingly, the judgment under review is affirmed with costs."

IV.

Specifications of Error.

1. The New Jersey Court of Errors and Appeals erred in failing to decide that Section 4 of Chapter 155, P. L. 1934, violated the Fourteenth Amendment of the Federal Constitution in that it denied due process of law.

2. The New Jersey Court of Errors and Appeals erred in failing to decide that Section 4 of Chapter 155 of the Laws of 1934, violated privileges and immunities guaranteed to appellants as citizens of the United States, under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

3. The New Jersey Court of Errors and Appeals erred in failing to decide that Section 4 of Chapter 155 of the Laws of 1934 violated the Tenth Section of Article 1 of the Constitution of the United States, which prohibits the States from passing *ex post facto* laws.

4. The New Jersey Court of Errors and Appeals erred in giving final judgment sustaining the judgment of the Supreme Court of New Jersey holding that Chapter 155, P. L. 1934, is a constitutional statute.

5. The New Jersey Court of Errors and Appeals erred in failing to acquit and discharge the appellants of the charges set out in the indictment, to wit, being gangsters in violation of Section 4 of Chapter 155 of the Laws of 1934.

V.

ARGUMENT.

Summary of Argument.

Point A—The statute in invalid because it violates the due process clause of the Constitution.

Point B—The statute is invalid because it denies the equal protection of the laws.

Point C—The statute is *ex post facto*.

Point A.

The Statute is Invalid Because it Violates the Due Process Clause of the Constitution.

The question here presented is whether citizens of Pennsylvania who were vacationing with their families at a New Jersey summer resort and who, at all times within the State of New Jersey, had conducted themselves in a well behaved and lawful manner, can be arrested, convicted and sentenced to a term of imprisonment of not less than five years nor more than ten years under a statute which provides, *inter alia* (R. 63):

> "Any person not engaged in any lawful occupation, known to be a member of any gang, consisting of two or more persons, who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in this or in any other state, is declared to be a gangster."

The State obtained a conviction by proving:

(1) That defendants were convicted of crime in Pennsylvania prior to the date this statute became a law.

(2) That defendants were "known" by the Philadelphia police to be members of the Lanzetta gang of Philadelphia, Pennsylvania.

(3) That they were unemployed at the time of the arrests.

We most respectfully submit that this statute is invalid because it is vague, indefinite and uncertain.

The statute permits the conviction of a person who has not committed an act of commission forbidden by criminal statute or an act of omission required by criminal statute. It permits the conviction of a person whose status is stated in the act irrespective of criminal intent. The present case clearly illustrates these conditions. Appellants were not shown to have been guilty of any unlawful conduct at any time in the State of New Jersey. There is affirmative evidence in this record which shows that although the Philadelphia Police testified the defendants were "known to be members of a gang" engaged in gambling activity, there were no criminal charges pending against any of them (R. 39).

It will be observed that under the statute, *supra*, proof of membership in a gang is not required. All that the statute requires is that the person be "known to be a member of any gang". "Known" is defined in Funk & Wagnall's New Standard Dictionary as "apprehended mentally", "recognized", "understood", and the synonyms mentioned, are "eminent," and "notorious". "Notorious" is defined as "being publicly or widely known, subject of general remark".

Under the language of this statute, a man might be a member of a gang but unless he was "known to be a member of a gang", he would escape conviction. The statute therefore appears to be vague and indefinite and not susceptible of reasonable interpretation, for one would be led to inquire at once: By whom is he to be known as a member

of a gang? What person must possess that knowledge? Does it mean that the knowledge must be possessed by neighbors or police in the locality or does it mean knowledge of persons in some far-off, distant place? As to these essential guides, the act is altogether silent. Criminal statutes which are carelessly drawn and which cannot be reasonably interpreted, are unenforceable and invalid.

Furthermore, the definition of a "gang" is left entirely to imagination. A gangster is defined in the statute, but the word "gang" is not defined.

A gang may be an innocent combination of persons so that the word "gang" is entirely without definition and leaves the odious acts denounced entirely to the imagination, caprice or whim of the person who is called upon to testify that the defendant is a known member of a gang.

The same situation exists with respect to the occupation feature of the statute. The circumstance which is denounced is a "person not engaged in lawful occupation". This would permit the conviction and punishment of a person who is so unfortunate as to be among the unemployed because of economic depression. If the Legislature did not intend to bring this innocent and unoffending group within the purview of the statute, it could have so worded the statute to have excluded them.

The Act does not create a criminal act of either omission or commission. It merely describes a "gangster" and prescribes for his punishment. In other words, it defines a status which we respectfully urge does not rise to the stature of a crime. This was clearly decided in

Goodman v. *Kinkle Warden*, 77 F. (2d) 623 (C. C. A., 7th Circuit),

where the Court said, "Habitual criminality is a state and not a crime."

This Court has repeatedly held that statutes which are vague, indefinite and uncertain and which do not fix ascertainable standards of guilt are constitutionally invalid.

In *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516, this Court said (page 520):

> "Therefore, because the law is vague, indefinite, and uncertain, and because it fixed no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained." * * *
>
> "The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question; that is, whether the words, 'That it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries' constituted a fixing by Congress of an ascertainable standard of guilt, and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee, and the result of which no one can foreshadow or adequately guard against."

The rule was reaffirmed in *Connolly, Commissioner*, v. *General Construction Company*, 269 U. S. 385, 70 L. Ed. 322 in these words (page 328):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who

are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. International Harvester Co. *v.* Kentucky, 234 U. S. 216, 221, 58 L. Ed. 1284, 1287, 34 Sup. Ct. Rep. 853; Collins *v.* Kentucky, 234 U. S. 634, 638, 58 L. Ed. 1510, 1511, 34 Sup. Ct. Rep. 924."

In *People* v. *Belcastro*, 356 Ill. 144, 190 N. E. 301, a statute similar to the one in this case was declared unconstitutional. The statute provided, *inter alia* (pages 302, 303):

"* * * all persons who, not being persons authorized by law to carry concealed upon or about their persons deadly weapons, are *reputed* to be habitual violators of criminal laws of this State or of the United States, or to habitually carry concealed on or about their persons or in motor vehicles or other conveyances, pistols, revolvers, or other firearms * * * and all persons who are reputed to act as associates, companions or bodyguards of such persons reputed as aforesaid. * * * shall be deemed to be, and they are declared to be vagabonds." Ill. Rev. Stat. (1935), Sec. 38, P. 606. (Italics supplied.)

In holding this statute to be invalid, the Court said (pp. 303, 304):

"* * * the amendment to the Vagrancy Act as above quoted is unconstitutional, as it seeks to punish an individual for what he is reputed to be regardless of what he actually is. * * *

"To say that certain acts shall constitute a crime and to fix the punishment therefor, is indisputably a part of the police power of the State. This power must be exercised, however, not as an unlimited authority, but

at all times subject to the mentioned restrictions in the Federal and State constitutions. * * *"

(P. 303:)

"When we consider the phrases 'reputed to be' and 'who are reputed to act', and the word 'reputed' as used in the amendment to the act, we are dealing with something which lacks body or substance. The word 'repute' when used as a noun, is defined in Webster's New International Dictionary as 'opinion, estimation or judgment'. When used as a verb the same authority defines it as 'to hold in thought, to esteem, to hold, the think, to attribute or to impute.' As used by the Legislature in the amendment, the word 'repute' used alone or as a part of the phrases mentioned, is synonymous with the words 'reputation' and 'opinion'. *As the act now stands it is silent as to the degree or extent of reputation or opinion necessary to warrant action under the amendment. The Legislature has left this important question of reputation to be arbitrarily decided by individuals, without prescribing any rules, basis, or limitations to act as a guide in forming judgment.* * * *"

(P. 304:)

"The ascertainment of a person's reputation may, and generally does, mean only the collection of expressions of opinion from different people. Once collected you have something you can rarely demonstrate as an existent fact. One's reputation might be good among one class of people or in one section of the city and bad among other classes or in other localities. Applying these observations to the amendment under consideration, it will be seen that the reputation of one charged with the crime of vagrancy may arise out of the collected opinions of law enforcement officers on the one hand and of his neighbors, business men, and friends on the other. So far as the amendment is concerned, these opinions will all be formed without the aid of

rules, limitations, or restrictions to guide them. For such proof to be submitted means that a court is bound to say that a person is a criminal because of a reputation resulting from opinions which may or may not be true. The establishment of a reputation required under the amendment means that a witness will be testifying to opinions—not to facts. * * * Here the corpus delicti must be proved by reputation, which might easily be based upon supposition or rumor rather than upon knowledge. Character is what a person is, reputation is what he is supposed to be. * * * If the Legislature leaves to administrative officers the determination of what the law shall be, or to determine what acts are necessary to effectuate the law, such delegation of authority is void. 1 Sutherland on Stat. Const. (2d Ed.) p. 148." (Italics supplied.)

The authorities dealing with this subject are carefully considered and reviewed in *United States* v. *Armstrong*, 265 Fed. 683, where defendant was charged with a violation of the Food Control Act passed by the War Congress in 1917, as follows (p. 687):

"In general it may be said that a criminal statute, to be valid, must be so clearly and definitely expressed that an ordinary man can determine in advance whether his contemplated act is within or without the law. On the other hand, it must not be so broad and elastic in its terms as to compel a man to guess at his peril whether a jury may think his act is in violation of it, and, if deviation from a standard is prohibited, the standard must be definitely fixed. In Railway Co. *v.* Dey (C. C.), 35 Fed. 866, 1 L. R. A. 744, Justice Brewer said:

" 'No penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it.'

"In Tozer *v.* United States (C. C.) 52 Fed. 917, the Court said:

" 'In order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty.'

"In United States *v.* Brewer, 139 U. S. 278 on page 288, 11 Sup. Ct. 538, on page 541 (35 L. Ed. 190) the Supreme Court said:

" 'Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. United States *v.* Sharp, Pet. C. C. 118. Before a man can be punished, his case must be plainly and unmistakably within the statute. United States *v.* Lacher, 134 U. S. 624, 628.' "

In discussing the "due process" clauses of the fifth and fourteenth amendments to the Constitution, the Court further stated (p. 689):

"By the simplest and plainest rules of construction, the words 'due process of law' must have the same meaning in the fifth and fourteenth amendments. This has been so stated in Hurtado *v.* California, 110 U. S. 516, 28 L. Ed. 232. • • •

"The Supreme Court has repeatedly been called upon to decide whether certain classifications in State statutes were reasonable or arbitrary, and whether they were in conflict with the fourteenth amendment. In Caldwell *v.* Texas, 137 U. S. 692, 697, 11 Sup. Ct. 224, 226 (34 L. Ed. 816), the Court had before it the validity of a State statute under this amendment, and it said:

" 'By the fourteenth amendment the powers of the States in dealing with crime within their borders are

not limited, but no State can deprive particular persons or classes of persons of equal and impartial justice under the law. Law, in its regular course of administration through courts of justice, is due process, and when secured by the law of the State, the constitutional requisition is satisfied. 2 Kent. Comm. 13. And due process is as secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. Bank of Columbia *v.* Okely, 4 Wheat 235, 244.'

"And in Grozza *v.* Tiernan, 138 U. S. 657, 13 Sup. Ct. 721, 37 L. Ed. 599, the Supreme Court said again:

"'Due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.'

"McGehee on Due Process of Law, p. 60, says:

"'Purely arbitrary decrees or enactments of the Legislature, directed against individuals or classes are held not to be "the law of the land", or to conform to "due process of law".'

Whenever the government undertakes to deprive a person of his liberty, as a punishment for crime, it must do it by virtue of a valid, constitutional statute defining the crime, and such a statute is required by the 'due process' clause of the fifth amendment. The statute upon which a person is deprived of his liberty is a part of the process of law which is used against him, and it must be 'due process of law' * * *."

A similar question was passed on in *United States* v. *Capital Traction Co.*, 34 App. D. C. 592, 18 Ann. Cas. 68, where a statute making it an offense for any street railway company to run an insufficient number of cars to accommodate

passengers "without crowding" was held invalid for uncertainty, the Court said:

> "* * * What shall be the guide to the court or jury in ascertaining what constitutes a crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. * * * There is a total absence of any definition of what constitutes a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment.
>
> "* * * The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. * * *"

The case last cited is considered and referred to in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516, at page 522 in a marginal statement. It is considered and approved in *Connolly* v. *General Construction Co.*, 269 U. S. 385, 70 L. Ed. 322, *supra*, at page 329.

The objections pointed out in the Statutes considered in the foregoing cases are present in this case. In this case the word "known" is used instead of "reputed" as in *People* v. *Belcastro, supra.* Here the legislature used the word "gang" whereas in the case of *United States* v. *Capital Traction Co., supra*, the words "crowded cars" were

used. In *United States* v. *Cohen, supra,* as in this case no specific or definite act was forbidden by statute.

In *Dirk DeJonge* v. *State of Oregon*, 299 U. S. 353, 366, 81 L. Ed. 278, the Criminal Syndicalism Law of the State of Oregon was held to be repugnant to the due process clauses of the fourteenth amendment. The Act defined "criminal syndicalism" as "the doctrine which advocates crime, physical violence, sabotage or any unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution". It provided *inter alia,*

> "Any person * * * who shall organize or help organize or solicit or accept any person to become a member of any society * * * which teaches or advocates criminal syndicalism * * * or any person * * * who shall preside at or conduct or assist in conducting any assemblage of persons, or any organization * * * which teaches the doctrine of criminal syndicalism * * * is guilty of a felony * * *."

The charge was that DeJonge assisted in the conduct of a meeting which was called under the auspices of the Communist Party, an organization advocating criminal syndicalism. The State failed to prove that criminal syndicalism or any unlawful conduct was taught or advocated at the meeting. Upon conviction defendant was sentenced to imprisonment for a term of seven years. In setting aside the conviction and holding that the Oregon Statute, as applied to the particular charge, was repugnant to the due process clause of the fourteenth amendment, this Court, in an opinion by Mr. Chief Justice Hughes said (p. 362):

> "Conviction upon a charge not made would be sheer denial of due process. It thus appears that, while defendant was a member of the Communist Party, he was not indicted for participating in its organization, or for joining it, or for soliciting members or for distrib-

uting its literature. He was not charged with teaching or advocating criminal syndicalism or sabotage or any unlawful acts, either at the meeting or elsewhere. He was accordingly deprived of the benefit of evidence as to the orderly and lawful conduct of the meeting and that it was not called or used for the advocacy of criminal syndicalism or sabotage or any unlawful action. His sole offense as charged, and for which he was convicted and sentenced to imprisonment for seven years, was that he had assisted in the conduct of a public meeting, albeit otherwise lawful, which was held under the auspices of the Communist Party.

"The broad reach of the statute as thus applied is plain. While defendant was a member of the Communist Party, that membership was not necessary to conviction on such a charge. A like fate might have attended any speaker although not a member, who 'assisted in the conduct' of the meeting. However innocuous the object of the meeting, however lawful the subjects and tenor of the addresses, however reasonable and timely the discussion, all those assisting in the conduct of the meeting would be subject to imprisonment as felons if the meeting were held by the Communist Party. This manifest result was brought out sharply at this bar by the concessions which the Attorney General made, and could not avoid in the light of the decision of the state court. Thus if the Communist Party had called a public meeting in Portland to discuss the tariff, or the foreign policy of the Government, or taxation, or relief, or candidacies for the offices of President, members of Congress, Governor, or state legislators, every speaker who assisted in the conduct of the meeting would be equally guilty with the defendant in this case, upon the charge as here defined and sustained. The list of illustrations might be indefinitely extended to every variety of meetings under the auspices of the Communist Party although held for the discussion of political issues or to adopt protests and pass resolutions of an entirely innocent and proper character."

In the *DeJonge* case the conviction was sustained on the theory that DeJonge was a member of the Communist Party, that he attended a meeting held under the auspices of that Party which advoca d doctrines which were denounced under the Oregon Statute. The conviction was set aside because the defendant was not shown to have committed any unlawful act. In the instant case, the statute denounces a "gangster" and provides for his punishment, but the State has wholly failed to prove that defendants committed any unlawful act.

In *Herndon* v. *Lowry*, 301 U. S. 242-278, 81 L. Ed. 1066, a Communist was charged and convicted of violating a Georgia Statute which made criminal any attempt to incite insurrection. When arrested, defendant had in his possession and in his room certain documents and papers dealing with the Communist Party and other subjects which the State contended were intended to incite insurrection. There was no evidence that appellant distributed any writings or printed matter which advocated forcible subversion of governmental authority. In a majority decision setting aside the conviction, this Court in an opinion by Mr. Justice Roberts said (pp. 261, 262):

> "The Statute, as construed and applied in the appellant's trial, does not furnish a sufficiently ascertainable standard of guilt. The Act does not prohibit incitement to violent interference with any given activity or operation of the State. By force of it, as construed, the judge and jury trying an alleged offender cannot appraise the circumstances and character of the defendar 's utterances or activities as begetting a clear and present danger of forcible obstruction of a particular state function. *Nor is any specified conduct or utterance of the accused made an offense.* • • • The law, as thus construed, licenses the jury to create its own standard in each case. In this aspect what was said in United States v. L. Cohen Grocery Co., 255

U. S. 81, 65 L. Ed. 516, 41 S. Ct. 298, 14 A. L. R. 1045, is particularly apposite:

"'*Observe that the section forbids no specific or definite act.* It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury * * *'" (p. 89). (Italics supplied.)

We respectfully urge that if in the *Herndon* case defendant's constitutional privileges are violated if he is convicted without proof of some definite unlawful act on his part, then that principle is applicable to this case because the defendants were not shown to have committed an unlawful act.

The objections pointed out in the cited case are equally applicable to this case. This act does not furnish a "sufficiently ascertainable standard of guilt" nor does it "forbid specific or definite acts."

The Supreme Court of New Jersey, whose decision was affirmed, in a *per curiam* opinion, by the New Jersey Court of Errors and Appeals, in disposing of appellants' constitutional objections to the statute, said (R. 69, 70):

"But the statute is not aimed at punishing convicted criminals because they are convicted criminals, but because, being such, they become members of a gang organized to plot and commit further crimes, and neglect or refuse to engage in any lawful occupation. The act

is therefore predicated on two present and voluntary acts of the party, both of which must concur; voluntary membership in a gang; and voluntary absentation from work."

It will be at once observed that the Court added to the language of the statute in order to give it effect. The Court said, "The act is therefore predicated on two present and *voluntary* acts of the party, both of which must concur; *voluntary* membership in a gang; and *voluntary* absentation from work." *The Act does not make voluntary membership in a gang and voluntary absentation from work essential elements of the offense.* On the contrary the Act merely declares that one known to be a member of a gang and without lawful occupation are the essential parts of the essence of the crime.

We do not think that the Court can introduce new conditions in a Statute in order to give it effect. If the Court should have this right, the conviction in this case must be set aside because *there is not a scintilla of evidence to show the existence of the "two present and voluntary acts of the party". There is no testimony in this entire record which shows that any of these defendants were members of the Lanzetta gang at the time of their arrest.* The evidence on the contrary was that they were "known" to be members of the gang. There is no testimony whatever to show that the defendants *voluntarily abstained from work.*

We respectfully urge, therefore, that the statute is unconstitutional and that the conviction of appellants thereunder was a denial of due process.

POINT B.

The Statute Denies the Equal Protection of the Laws.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374, 30 L. Ed. 220, in discussing the Fourteenth Amendment to the Constitution, this Court said (p. 226):

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

And it was further said (p. 227):

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered, by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this Court in Henderson *v.* Mayor, etc., of New York, 92 U. S. 259 (Bk. 23, L. Ed. 543); Chy Luny *v.* Freeman, 92 U. S. 275 (Bk. 23 L. Ed. 550); *Ex parte* Va., 100 U. S. 339 (Bk. 25 L. Ed. 676); Neal *v.* Delaware, 103 U. S. 370 (Bk. 26, L. Ed., 267), and Soon Hing *v.* Crowley (*supra*)."

Mr. Justice Fuller said in *McPherson* v. *Blacker*, 146 U. S. 1, 36 L. Ed. 869:

> "The inhibition that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of

persons from being singled out as a special subject for discriminating and hostile legislation."

Appellants contend that these principles of law are applicable to the facts in this case.

The statute under which appellants were indicted and convicted provided that one of the three essential elements of a "gangster", was a person who was convicted of a crime "in this (State of New Jersey) or any other state." Therefore, a person convicted of crime in any of the forty-eight States of the Union who is known to be a member of a gang and without lawful occupation, is declared to be a gangster and as such punishable under the Act. On the other hand, a person who was convicted of a crime in the District of Columbia or any territory of the United States who is known to be a member of a gang and without lawful occupation, is not subject to the operation of the Act. Both citizens, however, possess identical characteristics and are of the same class and no reasonable basis exists to justify any differentiation.

Inhabitants of the District of Columbia and of a territory, though citizens of the United States, are not citizens of a State within the meaning of the Constitution.

Hepburn v. *Ellzey*, 2 Cr. 445, 2 L. Ed. 332;
Reilly v. *Lamar*, 2 Cr. 344, 2 L. Ed. 300;
Barney v. *Baltimore City*, 6 Wall. 280, 18 L. Ed. 825;
New Orleans v. *Winter*, 1 Wh. 91, 4 L. Ed. 44;
American Ins. Co. v. *Canter*, 1 Pet. 511, 7 L. Ed. 242.

As a substantial legal distinction exists between a State and a territory, it cannot be reasonably argued that the use of the word "state" in the statute, embraces and includes a territory.

Reducing this contention to its practical effect, we have between a citizen of the United States convicted of crime

in a territory, and a citizen convicted of crime in a State, an unequal and discriminatory application under this Statute. The citizen who was convicted in a State would be subject to the provisions of the statute; whereas the citizen convicted of a crime in the District of Columbia or a territory, would not be subject to the Act.

It is also an unreasonable classification in a criminal statute to say to a person who may have visible means to support himself without engaging in gainful employment, that he must work because he has been convicted of a prior crime; whereas, as to another who has not been convicted of prior crime, there is no such requirement.

The provision in the Fourteenth Amendment which guarantees that a person shall not be deprived of life, liberty or property without due process of law, gives him the right to pursue any lawful occupation or vocation not inconsistent with the rights of others. It includes the right of contract, the right to transact business and it certainly means that he is privileged to follow no occupation or vocation if he has the financial means to maintain himself. We recognize the right of a sovereignty to require a citizen to bear arms or to render war time service but no such extraordinary circumstances are present in this case.

We earnestly urge that to require a person, who is financially able to live a life of leisure and who desires to enjoy the fruits of his property in this manner, to engage in an occupation or employment, is a plain and unwarranted deprivation of his property rights.

Appellants were undeniably engaged in a lawful pursuit at the time of their arrest—they were vacationing with their families—and it is not contended or proven that they were without visible means to enjoy this leisure.

This classification is unjust insofar as it relates to citizens or residents of the State of New Jersey, but it is especially unjust and oppressive to appellants, who were

in the State of New Jersey only temporarily; it is an attempt on the part of the State of New Jersey to assume an extra-territorial jurisdiction over citizens and residents of the State of Pennsylvania.

We concede that under proper circumstances the State of New Jersey can punish a person who is not engaged in lawful occupation; for instance, vagrants who have no visible means of support, but it is quite a different thing for the State of New Jersey to say to a citizen of Pennsylvania who has visible means of support and who desires to enjoy a lawful pursuit, that he cannot enter New Jersey because he is not engaged in an occupation.

We respectfully submit that under the Fourteenth Amendment to the Constitution, such an unreasonable and arbitrary classification is not permitted.

POINT C.

The Act is ex Post Facto.

Appellants contend that the Act violates Section 10 of Article 1 of the Federal Constitution which prohibits the States from passing *ex post facto* laws. The statute under which appellants were indicted and convicted, was enacted in 1934 (R. 63). The prior convictions upon which the State relies to sustain a conviction as to appellants, occurred many years before this statute was passed. As to Lanzetta, the conviction occurred on April 3, 1924; as to Del Rossi, March 2, 1927; as to Falcone, November 30, 1921.

The offense denounced under the statute is "gangster". The statute declares a gangster is a person (1) who is without lawful occupation; (2) who is known to be a member of any gang; (3) who has been convicted of prior crime. These three elements must concur to constitute a "gangster". As to each of the appellants, therefore, the State in order to prove an offense of "gangster", relied upon an

act which occurred years prior to the enactment of the statute.

Prior conviction, being one of the essential elements of the offense, was set forth in the indictment (R. 5); it was proved at the trial (R. 39), and the trial judge in charging the jury stated (R. 64):

> "They (the state) must also prove under the elements which are set up under the act, first, that these defendants, each of them, had no lawful occupation and, second, that they were known to be members of a gang consisting of two or more persons; *third, that they were convicted at least three times of being a disorderly person or that they were convicted of crime in this or any other state.*" (Italics supplied.)

In *Jaehne* v. *New York*, 128 U. S. 189, 32 L. Ed. 398, this Court said (p. 400):

> "'A legislative act may be entirely valid as to some class of cases and clearly void as to others. *A general law for the punishment of offenses which should endeavor to reach, by its retroactive operation, acts before committed, as well as to prescribe a rule of conduct for the citizen in future, would be void so far as it was retrospective;* but such invalidity will not affect the operation of the law in regard to the cases which were within the legislative control.' (Italics supplied.)
> Cooley Const. Lim. 5th Ed. 215."

In *Calder* v. *Bull*, 3 Dall. 386, 1 L. Ed. 648, Mr. Justice Chase, in discussing *ex post facto* laws, said (p. 650):

> "I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law

annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive. In my opinion, the true distinction is between *ex post facto* laws, and retrospective laws. Every *ex post facto* law must necessarily be retrospective; but every retrospective law is not an *ex post facto* law: The former, only, are prohibited. * * * But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction."

In *ex Parte Garland*, 71 U. S. 333, 18 L. Ed. 366, an Act of Congress was passed in 1865 requiring attorneys who desire to be admitted to the courts of the United States, to take an oath prescribed by an earlier Act of 1862 pertaining to Federal office holders. The supplementary Act provided that if any person took a false oath, he shall be guilty of perjury and subject to the penalties for that offense. The petitioner was ineligible to take said oath because he had borne arms for the Confederate States against the Union during the Civil War and the oath required that he swear that he had never supported a government hostile or inimical to the government or Constitution of the United States.

In holding the Statute to be *ex post facto*, the Court said (p. 369):

"The statute is directed against parties who have offended in any of the particulars embraced by these clauses. And its object is to exclude them from the profession of the law, or at least from its practice in the Courts of the United States. As the oath prescribed cannot be taken by these parties, the act, as against them, operates as a legislative decree or perpetual exclusion. And exclusion from any of the professions or

> any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct. The exaction of the oath is the mode provided for ascertaining the parties upon whom the act is intended to operate, and instead of lessening, increases its objectionable character." • • •
>
> "In the exclusion which the statute adjudges, it imposes a punishment for some of the acts specified which were not punishable at the time they were committed; and *for other of the acts it adds a new punishment to that before prescribed, and it is thus brought within the further inhibition of the Constitution against the passage of an ex post facto law.*" (Italics supplied.)

We consider the *Garland* case especially pertinent because one of the essential elements of the offense of gangster relates to a past act. The effect of the Act is to make the prior conviction an unlawful element and to add a new and greater punishment.

In *McDonald* v. *Massachusetts*, 180 U. S. 311, 45 L. Ed. 542, the Habitual Criminal Act of Massachusetts was declared constitutional, and the statute provided:

> "Whoever has been twice convicted of crime, sentenced and committed to prison in this or any other state, or once in this and once at least in any other state for terms of not less than three years each, shall *upon conviction of a felony committed in this state* after the passage of this Act, be deemed to be an habitual criminal and shall be punished by imprisonment in the state prison for twenty-five years:"

The Court said (pp. 546, 647):

> "The fundamental mistake of the plaintiff in error is his assumption that the judgment below imposes an additional punishment, on crimes for which he had already been convicted and punished in Massachusetts and in New Hampshire.
>
> "But it does no such thing. The statute under which it was rendered is aimed at habitual criminals; and

simply imposes a heavy penalty upon conviction of a felony committed in Massachusetts since its passage, by one who had been twice convicted and imprisoned for crime for not less than three years, in this, or in another state, or once in each. The punishment is for the new crime only, but is the heavier if he is an habitual criminal. Statutes imposing aggravated penalties on one who commits a crime after having already been twice subjected to discipline by imprisonment have long been in force in Massachusetts; and effect was given to previous imprisonment, either in Massachusetts or elsewhere in the United States, by the Statute of 1827, chap. 118, Sec. 19, and by the Revised Statutes of 1836, chapter 133, Sec. 13. It is within the discretion of the legislature of the state to treat former imprisonment in another state as having the like effect as imprisonment in Massachusetts, to show that the man is an habitual criminal. *The allegation of previous convictions is not a distinct charge of crime,* but is necessary to bring the case within the statute, and goes to the punishment only. The statute, imposing a punishment on none but future crimes, is not *ex post facto.*" (Italics supplied.)

In the *McDonald* case, the Court clearly indicated that if punishment was imposed for an act other than a future crime, the law would have been *ex post facto.* This important distinction is pointed out by the Court in the *McDonald* case where the Court said:

> "The punishment is for the new crime only, but is heavier if he is an habitual criminal."

The Court further pointed out:

> "The allegation of previous convictions is not a distinct charge of crimes, but is necessary to bring the case within the statute and goes to the punishment only. The statute imposing a punishment on none but future crimes, is not *ex post facto.*" (Italics supplied.)

Here, however, the Act does not provide for punish for "future" crime. The only crime provided for is t of "gangster", an essential element of which is proof prior crime.

In *Graham* v. *W. Va.*, 224 U. S. 613, 56 L. Ed. 917, t *McDonald* case was considered and approved. In hold that the Habitual Criminal Act of Virginia was constitutional, it was pointed out that the prior conviction w merely an incident rather than an essential element of t offense. The Court said (p. 921):

> "In the present case, it was not charged in the i dictment on which the prisoner was last tried, th he had previously been convicted of other offenses, b after judgment he was brought before the Court of a other county, in a separate proceeding instituted b information and on the finding of the jury that he w the former convict, he was sentenced to the additiona punishment which the statute in such case prescribed."

In the instant case, as we have shown, the prior convic tion was a distinct allegation in the indictment and was a inseparable element of the crime.

We most respectfully submit that this statute, in so fa as it affects appellants, is an *ex post facto* law.

Conclusion.

Appellants have been convicted and sentenced under a statute which is repugnant to Section 10 of Article 1, an the Fourteenth Amendment to the Constitution of th United States, and the judgment of conviction upon whic appellants have been sentenced, should be reversed and the appellants should be discharged from imprisonment.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 308

IGNATIUS LANZETTA, MICHAEL FALCONE AND LOUIE DEL ROSSI,

Appellants,

vs.

THE STATE OF NEW JERSEY.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF OF THE STATE OF NEW JERSEY.

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INDEX.

	PAGE
Argument	5
Brief	3
Jurisdiction	1
Statement	2

Table of Cases Cited.

Baldwin v. *State* (Ind.), 141 N. E. 343	17
Barbier v. *Connelly*, 113 U. S. 27	15
Bonfitch v. *Boston*, 111 U. S. 18	10
Burgess v. *Salmon*, 97 U. S. 382	22
Compagnie Francaise v. *Louisiana*, 186 U. S. 380	10
Chicago, etc., 1 L. R. A. 744	7
Donnelly v. *General Construction*, 269 U. S. 385	7
Donovan v. *Public Service*, 80 N. J. L. 681	13
Crowley v. *Christensen*, 137 U. S. 89	10
Duncan v. *Missouri*, 152 U. S. 382	22
Ex parte *Cutler*, 31 Pac. (2d) 441	11
Ex parte *Irvin*, 106 Ohio St. 50	11
Farmers' & Merchants Bank v. *Fed. Reserve* (Va.), 262 U. S. 649	15
Fox v. *Washington*, 236 U. S. 273	8
Frank v. *Mangum*, 237 U. S. 309	10
Garland v. *Washington*, 232 U. S. 642	10
Gibson v. *Miss.*, 162 U. S. 589	22
Hatch v. *Matthews*, 31 N. Y. Supp. 926 (Words and Phrases, Vol. 4, p. 3040)	13
Hopper v. *Stack*, 69 N. J. L. 562	12
Hunt v. *State* (Indiana), 146 N. E. 329	14
In re *Jacobs*, 98 N. Y. 98; 50 Am. Rep. 636	10
International Harvester v. *Kentucky*, 234 U. S. 216	7
Keokee Consolidated v. *Taylor*, 234 U. S. 224	16
Knox Co. v. *Johnson*, 209 U. S. 511	9
Kring v. *Missouri*, 107 U. S. 235	22
Levine v. *State*, 110 N. J. L. 467	11
Lindsley v. *National Carbonic Gas Co.*, 220 U. S. 62	8
Malloy v. *South Carolina*, 237 U. S. 180	22

Page

Mason v. *Hunt*, 16 Fed. Supp. 285 9
Miller v. *Strahl*, 239 U. S. 426 6
Miller v. *Wilson*, 236 U. S. 373 17
Murphy v. *Ramsey*, 114 U. S. 15 21
Nash v. *United States*, 229 U. S. 373 8
New Orleans Gas v. *Louisiana Heat & Light*, 115 U. S. 650 15
Omaechevarria v. *Idaho*, 246 U. S. 343 7
Panhandle Eastern Pipe v. *Highway Commission of Kansas*, 294 U. S. 613 15
Patsone v. *Pennsylvania*, 232 U. S. 138 16
People v. *Berman*, 282 N. Y. Supp. 484 11
People v. *Lloyd*, 304 Ill. 23 8
People v. *Ruthenberg*, 229 Mich. 315 8
People v. *Steelik*, 187 Cal. 361 8
Shevlin-Carpenter v. *Minnesota*, 218 U. S. 57, 69 13
State v. *Hennessy*, 114 Wash. 351 8
State v. *Laundy*, 103 Or. 443 8
State v. *Maxcy*, 26 South Carolina Law, 501 10
State v. *McClure*, 105 Atl. 712 13
State v. *Pius*, 118 N. J. L. 212 16
State v. *Rheaume*, New Hampshire; 116 Atl. 758 12
Stewart v. *Michigan*, 232 U. S. 665 10
Terrace v. *Thompson*, 263 U. S. 197 15
Thompson v. *Utah*, 170 U. S. 351 22
Tozer v. *United States*, 52 F. 917 7
United States v. *Balint*, 258 U. S. 250 17
United States v. *Brewer*, 139 U. S. 278, 288 7
U. S. Bldg. & Loan v. *McClelland*, 6 Fed. Supp. 299 .. 15
Watson v. *Maryland*, 218 U. S. 173 10
Whitney v. *California*, 274 U. S. 357 6

STATUTES CITED.

Chapter 155, Laws of N. J. 1934, P. L. page 394 3

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---

1. Jurisdiction.

The statutory provision concerning the jurisdiction of he United States Supreme Court for a review of this ppeal is as set forth in the defendant's brief, being Section 33 A of the Judicial Code, Act of February 13, 1925, Chapter 229, 43 Stat. 936.

Under the above statute, the appeal in this case should e dismissed because the statute in question is not repug-

nant to the Constitution, Treaties or Laws of the United States, but is a valid statute passed by the Legislature of the State of New Jersey under the police power of the State.

(U. S. Sup. Wash. 1923) In the exercise of police powers the State has wide discretion in determining its own public policy, and what measures are necessary for its own protection, and to promote the safety, peace, and good order of its people. Terrace v. Thompson, 44 S. Ct. 15, 263 U. S. 197, 68 L. Ed. 255.

(U. S. Sup. N. C. 1923) A State Legislature may direct its police regulations against what it deems an existing evil, without covering the whole field of possible abuses, notwithstanding the equal protection clause of the federal Constitution. Farmers' & Merchants Bank of Monroe, N. C., *v.* Federal Reserve Bank of Richmond, Va., 43 S. Ct. 651, 262 U. S. 649, 67 L. Ed. 1157, 30 A. L. R. 635, reversing decree (1922) 112 S. E. 252, 183 N. C. 546.

The police power embraces the protection of the lives, health, and property of citizens, the maintenance of good order, and the preservation of good morals. Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923.

The power of the Legislature to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety, is inherent in the sovereignty of the State, and cannot be bartered away by contract or otherwise. New Orleans Gaslight Co. *v.* Louisiana Light & Heat Producing & Manufacturing Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. Ed. 516.

Statement.

The Cape May County Grand Jury of the April Term, 1936, in session on July 31, 1936, indicted the three appellants, Frank Pius, alias Ignatius A. Lanzetta, etc.; Michael Falcone, alias Mickey Britt; and Louis Del Rossi, alias

Fattie Louie, for violation of Chapter 155 of the Laws of 1934, commonly called "Gangster Act" or "Public Enemies Act."

The pertinent sections of the act under which the defendants were convicted are as follows:

1. A gangster is hereby declared to be an enemy of the State.

4. Any person, not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other State, is declared to be a gangster.

Said indictment was tried on September 14 and 15, 1936, and a verdict returned of "guilty, with recommendation for mercy." Upon that judgment of conviction, appellants were sentenced to a term of not more than ten years and not less than five years in State's Prison. Following the conviction, a writ of error was prosecuted in the Supreme Court of New Jersey and judgment affirmed. Then an appeal was taken to the Court of Errors and Appeals with like result. The present appeal alleges error in such affirmance.

Facts.

Appellants were arrested, either simultaneously or within a few minutes of each other, at or in the vicinity of 107 East Crocus Road, Wildwood Crest, on July 24, 1936. The arrests were made by officers of the New Jersey State Police, in cooperation with members of the Philadelphia Police Department (R. 17, 25, 27, 28). The association of the defendants at said address was proven (R. 16, 17, 20, 24, 25).

When questioned at or about the time of their arrest, the defendants all claimed to have occupations, but the

most recent work done by any one of them at his alleged occupation was more than two years before the arrest; Lanzetta had not been employed for five years, DelRossi for over two years and Falcone for four years (R. 19-20, 26).

Detective Captains Ryan and Creeden and Detective Peltz, all of the Philadelphia Police Department, testified that they knew the defendants to be members of "the Lanzetta gang" (R. 33, 40).

Prior convictions of crimes in the State of Pennsylvania were proven against the three defendants, both by the testimony of police officers who were personally present when such convictions were had, and by exemplified copies of the proceedings.

The defendants did not take the stand to testify each in his own behalf.

The question concerning the weight of evidence is not before this Court because the weight of evidence, on exceptions and error were abandoned in the Court of Errors and Appeals of New Jersey. Further, appellants admit the crime to be proven as in the brief of counsel for appellants, he states as follows:

> "The State obtained a conviction by proving:
>
> (1) That defendants were convicted of crime in Pennsylvania prior to the date this statute became a law.
>
> (2) That defendants were 'known' by the Philadelphia police to be members of the Lanzetta gang of Philadelphia, Pennsylvania.
>
> (3) That they were unemployed at the time of the arrests." (Brief, pp. 7 and 8).

ARGUMENT.

I.

Act Is a Valid Exercise of the Police Power, and as Such, Does Not Contravene the "Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution."

this case the State of New Jersey contemplated an that would prevent gangsters from descending upon State from other States or gangsters in this State ning themselves into gangs for the purposes of com- ing crimes. The State of New Jersey, as a part of olice power, has a large measure of discretion in creat- and defining criminal offenses, and a statute of this racter does not violate the due process provision of Federal Constitution, nor deny the violators of the ute the equal protection of the laws, where it operates out discrimination on all persons, and classes of per- , similarly situated, nor does it violate the provisions he State Constitution of New Jersey under which such slation was upheld by a decision of the Court of Errors Appeals in the case of *Levine* v. *State*, 110 N. J. L. 467. Where the words by which the offense is created and de- d by statute are fully descriptive of it, and therefore nical, the offense may be charged in the general words he statute, without particularizing the offense.

The police of a State, in a comprehensive sense, embraces whole system of internal regulation, by which the State ts not only to preserve the public order and to prevent nses against the State, but also to establish for the rcourse of citizens with citizens those rules of good nners and good neighborhood which are calculated to vent a conflict of rights, and to insure to each the un- rrupted enjoyment of his own so far as is reasonably sistent with a like enjoyment of rights by others. ooley Const. Lim. (8th ed.) 1223.

It is the undoubted function of the State to apprehend those who would violate laws ordained to protect the person and property of citizens, and who are seeking the opportunity to do so. Such persons are determined and ever active foes of society. Due process required that a penal statute be sufficiently explicit to inform those subject to it what conduct on their part will render them liable to its penalties and that it should be couched in terms not so vague that men of common intelligence must necessarily guess at its meaning.

In the case of *Whitney* v. *People of State of California*, 274 U. S. 357, the Court held:

> "The determination of the Legislature that the acts defined involve such danger to the public peace and security of the State that they should be penalized in the exercise of the police power must be given great weight and every presumption be indulged in favor of the validity of the statute, which could be declared unconstitutional only if an attempt to exercise arbitrarily and unreasonably the authority vested in the State in the public interest. (p. 371)
>
> "The equal protection clause (Const. U. S. Amend. 14) does not take from a State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion, and avoids what is done only when it is without a reasonable basis and purely arbitrary.
>
> "A statute does not violate the equal protection clause merely because it is not all-embracing; hence a State may properly direct its legislation against what it deems an existing evil, without covering the whole field of possible abuses.
>
> "A statute must be presumed to be aimed at an evil where most felt, and is not to be overthrown as violative of equal protection clause merely because other instances may be suggested to which it might also be applied."

The Court further said in the above case:

"It is clear that the Syndicalism Act is not repugnant to the due process clause by reason of vagueness and uncertainty of definition. It has no substantial resemblance to the statutes held void for uncertainty under the Fourteenth and Fifth Amendments in International Harvester Co. v. Kentucky, 234 U. S. 216, 221; 34 S. Ct. 853; 58 L. Ed. 516, 14 A. L. R. 1045, because not fixing an ascertainable standard of guilt. The language of section 2, subd. 4, of the act under which the plaintiff in error was convicted is clear; the definition of 'criminal syndicalism' specific.

"The act plainly meets the essential requirements of due process that a penal statute be 'sufficiently explicit' to inform those who are subject to it what conduct on their part will render them liable to its penalties, and be couched in terms that are not 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' Connally v. General Construction Co., 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322. And see United States v. Brewer, 139 U. S. 278, 288; 11 S. Ct. 538; 35 L. Ed. 190; Chicago, etc., 1 L. R. A. 744; Tozer v. United States (C. C.), 52 F. 917. In Omaechevarria v. Idaho, 246 U. S. 343; 38 S. Ct. 323; 62 L. Ed. 763, in which it was held that a criminal statute prohibiting the grazing of sheep on any 'range' previously occupied by cattle 'in the usual and customary use' thereof, was not void for indefiniteness because it failed to provide for the ascertainment of the boundaries of a 'range' or to determine the length of time necessary to constitute a prior occupation a 'usual' one, this Court said:

"'Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other States. This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this Court. Nash

v. United States, 229 U. S. 373, 377; 33 S. Ct. 780; 57 L. Ed. 1232; Miller *v.* Strahl, 239 U. S. 426, 434; 36 S. Ct. 147; 60 L. Ed. 364.'

"So, as applied here, the Syndicalism Act required of the defendant no 'prophetic' understanding of its meaning.

"And similar Criminal Syndicalism statutes of other States, some less specific in their definitions, have been held by the State courts not to be void for indefiniteness. State *v.* Hennessy, 114 Wash. 351; State *v.* Laundy, 103 Or. 443; 204 P. 958. People *v.* Ruthenberg, 229 Mich. 315; 210 N. W. 358. And see Fox *v.* Washington, 236 U. S. 273; 35 S. Ct. 383; 59 L. Ed. 573; People *v.* Steelik, 187 Cal. 361, 203 P. 78; People *v.* Lloyd, 304 Ill. 23, 136 N. E. 505.

"Neither is the Syndicalism Act repugnant to the equal protection clause, on the ground that as its penalties are confined to those who advocate a resort to violent and unlawful methods as a means of changing industrial and political conditions, it arbitrarily discriminates between such persons and those who may advocate a resort to these methods as a means of maintaining such conditions.

"It is settled by repeated decisions of this Court that the equal protection clause does not take from a State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary, and that one who assails the classification must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 62; 31 S. Ct. 337; 55 L. Ed. 369, Ann. Cas. 1912C, 160, and cases cited.

" 'Statute does not violate equal protection clause of Constitution merely because it is not all-embracing and Legislature is free to recognize degrees of harm and may confine its restrictions to those classes of cases

where the need is deemed to be clearest.' Const. U. S. Amend. 14, S. H. Kress & Co. *v.* Johnson, 209 U. S. 511.

"'Requirement of due process is met where in proceedings affecting all persons alike, a person is presented by indictment in Court of competent jurisdiction for commission of offense under law not in itself repugnant to Federal Constitution, and tried in such Court according to regulations and law applicable to proceedings in that jurisdiction in course of an orderly administration thereof after opportunity is presented for hearing and defense.' U. S. ex rel. Mason *v.* Hunt, 16 Fed. Supp. 285."

The appellants argue the statute is unconstitutional because it violates the due process of law clause as found in the 14th Amendment. The fifth amendment is not in controversy as it is a check on the Federal Government only, and is not applicable between State and an individual. So numerous are the citations to this effect, and so elementary is that holding that we do not think it necessary to cite authority.

The 14th Amendment as restrictive against the State, says in part "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

As to what "due process of law" is in terms, volumes would be needed to completely explain. One thing we may be certain of is that "due process" is no limitation on the State in the proper exercise of police power.

The prohibition against deprivation of life, liberty or property without due process of law does not restrict the power of the States to enact regulations respecting the public health and safety. For the public good, individuals must suffer the destruction of property, or even life, rights of necessity being part of the law, and the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority es-

sential to the safety, health, peace, good order, and morals of the community.

Campagnie Francaise v. *Louisiana*, 186 U. S. 380;
Bowditch v. *Boston*, 101 U. S. 18;
Crowley v. *Christensen*, 137 U. S. 89;
In re Jacobs, 98 N. Y. 98; 50 Am. Rep. 636.

"Due process of law" is complied with when a party is regularly indicted by the proper grand jury in the State court, has a trial according to the forms and modes prescribed for such trials, and when in that trial and proceedings he is deprived of no rights which he is lawfully entitled to.

Frank v. *Mangum*, 237 U. S. 309;
Stewart v. *Michigan*, 232 U. S. 665;
Garland v. *Washington*, 232 U. S. 642;
Watson v. *Maryland*, 218 U. S. 173.

Was this a reasonable exercise of police power? It most certainly was.

Here are three men, known as members of a gang, already having a reputation and having no lawful occupation together. It is only natural for them to conspire to act together at some time in the future against the public good. This statute was passed to check the evil in the beginning rather than to punish after an offense has been committed and thus to insure the public safety.

To cite only a few instances wherein the courts have upheld analagous statutes, mention can be made of the case of *State* v. *Maxcy*, 26 S. C. L. 501, in which the Court with reference to the State vagrancy statute said:

> "I think it is not the main purpose of those acts to proceed by way of punishing for the offense, for vagrancy in itself can hardly be deemed a distinct offense. The acts seem rather intended to afford so

adequate security to the public against the danger to be apprehended on the several classes of persons enumerated or on whom from their want of honest employment or from their vicious pursuits may well be considered as dangerous to society."

New York held a similar statute did not deny due process in *People* v. *Berman,* 282 N. Y. Supp. 484. The statute in question penalizes for disorderly conduct one who bears an evil reputation and with an unlawful purpose consorts with thieves and criminals or frequents unlawful resorts, and creates a presumption against defendant proven to have evil reputation and to have consorted with criminals or individuals of like reputation.

In *ex parte Cutler,* 36 Pac. (2nd) 441, the Court held a statute making it a crime to roam about from place to place without any lawful business not unconstitutional as being too broad or indefinite to state a public offense.

In *Levine* v. *State,* 110, N. J. L. 467, Justice Heher says, in discussing a similar statute: "The manifest purpose of this legislation is to check evil in the beginning and thus to insure the public safety. It provides for the apprehension and punishment of a class that menaces the security of person and property."

We have then, a reasonable exercise of police power, under the due process clause, followed by a regular indictment by grand jury, and trial according to the forms and modes prescribed.—All giving the defendants their due process, which they complained was withheld.

In *ex parte Company* and *ex parte Irvin,* 106 Ohio St. 50, 139 N. E. 204, the Supreme Court of Ohio stated:

"There is perhaps no provision of the Federal Constitution that is more overworked than the Fourteenth Amendment. Counsel generally are apparently unanimous in thinking that any judgment or finding as against the client denies such client the equal protection

> of the laws, or is without due process of law. It has been so many times decided that the Fourteenth Amendment does not limit the States in the proper exercise of police power that citation of authority seems needless."

The State perceived the existence of a menace to the safety and welfare of its people, and, in the exercise of its sovereignty, enacted appropriate legislation to curb the menace at its inception. To deny the existence of gangs and gangsters would be to emulate the fabled antics of the foolish ostrich in burying his head in the sand, or the three wise monkeys, who "hear no evil, see no evil, and speak no evil." Having acknowledged the condition, it was entirely fitting that the legislature should act as it did. In *Hopper* v. *Stack*, 69 N. J. L. 562, it was held:

> "The recognition by the Legislature of the existence of conditions that, in its judgment, require regulation under its police power, is to be distinguished from the creation by the Legislature of conditions that previously had no existence."

The questions of due process and class legislation are interestingly discussed in *State* v. *Rheaume* (New Hampshire), 116 Atl. 758 at 759, as follows:

> "But this clause (the 14th Amendment) was not designed to interfere with the exercise of the police power of the States for the protection of the lives liberty and property of its citizens or for the promotion of the public safety, peace and order. (Citing cases) * * *. The Fourteenth Amendment did not abridge the right of protection inherent in the States and reserved when the Constitution was adopted. (Citing cases) * * * In Mulger *v.* State of Kansas *supra*, it was said: 'It cannot be supposed that the States intended, by adopting that amendment, to impose restraints upon the exercise of their powers for

the protection of the safety, health, or morals of the community.' For these purposes the Legislatures have a wide field of discretion in classification of subjects of legislation. * * * A statute is not objectionable as class legislation because it affects only the members of one class, if the classification involved in the law is founded upon a reasonable basis. * * * Every presumption will be entertained in favor of the reasonableness of the basis of classification adopted by a State under its police power against an attack based upon the equal protection clause of the Fourteenth Amendment."

It is urged, on behalf of appellants, that the language used in creating the crime is vague and indefinite, and that the Fourteenth Amendment is therefore violated because appellants did not have due notice of the nature of the charge. It is respectfully submitted that this is not so. It is preposterous to contend that any other than a malevolent meaning can be applied to the word "gang" as it is used in this statute. The Legislature did not use the word "gangster" three times in the act, with the intent that its derivative "gang" should have or be susceptible of a perfectly innocent meaning. The only definition of the word in its legal significance that is disclosed by considerable research is that contained in *Hatch* v. *Matthews,* 31 N. Y. Supp. 926 (Words and Phrases, Vol. 4, p. 3040), as follows:

> "The word 'gang' is sometimes used to describe a body of men associated together for purposes entirely proper, as a gang of laborers; but is commonly used to describe a body of men banded together for improper or unlawful purposes, like a gang of thieves, a gang of robbers. * * *"
>
> "The popular and generally accepted meaning of language will be applied to the construction of an act of the Legislature in the absence of a legislative intent to the contrary." Conover *v.* Public Service Ry. Co., 80 N. J. L. 681.

"A Court cannot nullify the enactment of the Leg lature because the language used is indefinite in so particular, unless the purpose or intent of the Leg lature cannot be ascertained. The intent of the Leg lature is the essence of the law, and the function of t Court in construing legislative enactment is to asc tain the legislative intent, and to enforce such int when ascertained. * * * The cardinal principle construing a statute is to seek the intention of t legislative will; and a rule of law equally as w grounded is that the enactment of the Legislatu must be effectuated if possible. The intention of t lawmaker is the law. The Court will not extend t meaning of the statute by construction but such c struction will be given that, when practically appli will aid in preventing the evil which the ascertain intent aimed to prohibit." Hunt *v.* State (India Supreme Court), 146 N. E. 329 at 330.

There is no ambiguity in the use of the phrase "kno to be." Webster's International Dictionary gives, in *alia,* the following definition of "know:"

"To have immediate experience of; to be acquain with; to be no stranger to; to be more or less famil with the person, character, etc., of * * *."

In this sense, it is easily distinguished from the use the word "reputed" in similar statutes, where the lat word has been held to have the force only of opinion. T knowledge required by the statute appears to be qu plainly nothing more than the knowledge of any pers however acquired.

The State of New Jersey has power under its Consti tion and under its *police power* to pass such an act that in dispute before this Court.

(U. S. Sup. Wash. 1923) In the exercise of pol powers the State has wide discretion in determin

its own public policy, and what measures are necessary for its own protection, and to promote the safety, peace and good order of its people. Terrace *v.* Thompson, 44 S. Ct. 15, 263 U. S. 197, 68 L. Ed. 255.

(U. S. Sup. N. C. 1923) A State Legislature may direct its police regulations against what it deems an existing evil, without covering the whole field of possible abuses, notwithstanding the equal protection clause of the Federal Constitution. Farmers' & Merchants Bank of Monroe, N. C. *v.* Federal Reserve Bank of Richmond, Va., 43 S. Ct. 651, 262 U. S. 649, 67 L. Ed. 1157, 30 A. L. R. 635, reversing decree (1922) 112 S. E. 252, 183 N. C. 546.

The police power embraces the protection of the lives, health and property of citizens, the maintenance of good order, and the preservation of good morals. Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923.

The power of the Legislature to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety, is inherent in the Sovereignty of the State, and cannot be bartered away by contract or otherwise. New Orleans Gaslight Co. *v.* Louisiana Light & Heat Producing & Manufacturing Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. Ed. 516.

"Police power springs from State's obligation to protect citizens and provide for safety and good order of society, and its governmental power of self-protection, permitting reasonable regulation of rights and property in particular essential to preservation of community from injury." Panhandle Eastern Pipe Line Co. *v.* State Highway Commission of Kansas, 294 U. S. 613.

"State police power may be extended in aid of that which, by strong and preponderant opinion is thought necessary for public welfare." U. S. Building & Loan Assn. *v.* McClelland, 6 Fed. Supp. 299.

II.

The Statute Is Not Discriminatory, and Does Not Deny to Appellants the Equal Protection of the Law.

In order for the defendants to come within the statute, they must have been convicted at least three times of being a disorderly person, or convicted of a crime in this or any other State; must be not engaged in any lawful occupation; and must be a member of a gang consisting of two or more persons. These elements must concur. (*State* v. *Pius*, 118 N. J. L., 218). The classification is a reasonable one, and it is not shown that the statute would not operate alike on all persons similarly situated.

> "We start with a general consideration that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. The State 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.'" Patsone *v.* Pennsylvania, 232 U. S. 138, 58 L. Ed. 539, 543.

In *Keokee Consol. Coke Co.* v. *Taylor*, 234 U. S. 224, 34 S. Ct. 856, 857 L. Ed. 1288, 1290, the Court said:

> "But while there are differences of opinion as to the degree and kind of discrimination permitted by the Fourteenth Amendment, it is established by repeated

decisions that a statute aimed at which is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the Court can see. That is for the Legislature to judge unless the case is very clear."

In *Miller* v. *Wilson*, 236 U. S. 373, 35 S. Ct. 342, 59 L. Ed. 628, 632, L. R. A. 1915 F, 829, in a discussion of classification, the Court, speaking by Mr. Justice Hughes, said:

> "It (the Legislature) is free to recognize the degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is specially experienced in a particular branch of business' it is not necessary that the prohibition 'should be couched in all-embracing terms.'"

In *Baldwin* v. *State* (Supreme Court of Indiana), 141 N. E. 343, 345, the Court held:

> "The classification cannot be arbitrary, but must be reasonable. However, the classification will be upheld unless it is so manifestly inequitable and unjust that it would cause an imposition of a burden on one class to the exclusion of another without reasonable distinction. It is primarily for the Legislature to determine the classification, and is never a judicial question unless the classification under no circumstances can be viewed as reasonable."

Appellants also contend that the statute is in violation of due process because of some possible difficulty on the part of defendants in determining whether or not they come within the category proscribed by the statute. In *United States* v. *Balint*, 258 U. S. 250, 66 L. Ed. 604, it was held:

"The Legislature may well consider that the int
or knowledge of the defendant is immaterial, in v
of the widespread evil which his acts cause, equa
whether done with or without knowledge."

In discussing this proposition, Mr. Chief Justice Ta
speaking for the Court, said:

"While the general rule at common law was th
the scienter was a necessary element in the indictme
and proof of every indictment, and this was follow
in regard to statutory requirements, even where t
statutory definition did not, in terms, include it • •
there has been a modification of this view in respect
prosecutions under statutes, the purpose of whic
would be obstructed by such a requirement. It is
question of legislative intent, to be construed by th
Court. It has been objected that punishment of a pe
son for an act in violation of the law, when ignoran
of facts making it so, is an absence of due process o
law. But that objection is considered and overrule
in Shevlin-Carpenter Co. *v.* Minnesota, 218 U. S. 57
69, 70, 54 L. Ed. 930, 935, 936, 30 Sup. Ct. Rep. 663, i
which it was held that in the prohibition or punishmen
of particular acts, the State may, in the maintenance
of a public policy, provide 'that he who shall do them
shall do them at his peril, and will not be heard to
plead in defense, good faith or ignorance.' Many in-
stances of this are to be found in regulatory measures
in the exercise of what is called the police power,
where the emphasis of the statute is evidently upon
achievement of some social betterment, rather than
the punishment of the crimes, as in cases of *mala*
in se."

Some emphasis is placed upon the contention that the
statute attempts an unconstitutional definition of crime, in
that it denies the defendant the right to choose between
engaging and not engaging in a lawful occupation. In this

connection, it is interesting to note the reaction of the Court to a Delaware statute enacted during the late war, requiring all able-bodied men between certain ages to be engaged in some "useful or lawful occupation." While it is conceded that we are not presently engaged in any war, as the term is generally understood, it is submitted that the Court may take judicial notice of the fact that at least a prolonged skirmish is in progress within our borders, between the forces of law and society on the one hand, and the forces of crime on the other. In the case above mentioned, which is that of State *v.* McClure, reported in 105 Atl., 712, the Court said:

> "It is generally known that the demands of the national government in waging the present war have greatly curtailed the means of preventing crime and reduced the number of men available to protect the lives and property of the public. It was proper for the Legislature, having this in mind, to pass reasonable and just laws *to preserve order within the State and to protect the lives and property of those within its borders* (italics ours) by providing that male residents between certain ages should be engaged in some useful or lawful occupation."

It is not intended by these citations to constitute lack of lawful occupation, standing alone, as a crime; but they do illustrate the trend of thought and the fruit of human experience, in both ancient and modern times; and explain what the Legislature undoubtedly had in mind when the law was enacted. This line of reasoning also directs attention to the fact that appellants, in their argument, have fallen into the very obvious error of considering the component parts of this crime separately. Each of the elements set forth in the statute is belabored and excoriated as condemning an act or condition which is perfectly innocent in itself; but one might with similar logic contend that, be-

cause it is no crime for a man to marry, and no crime
a man to have a wife, it is no crime for a man to marry wi
he already has a wife.

A statute very similar to the one under discussion w
held to be valid in *Levine* v. *State*, 110 N. J. L. 467. In t
case, Mr. Justice Heher, speaking for the Court of Err
and Appeals, said:

> "The manifest purpose of this legislation is to ch
> evil in its beginning and thus to insure the pu
> safety. The statute is not arbitrary or unreasona
> It provides for the apprehension and punishment
> a class that menaces the security of person and pr
> erty."

THE ACT IS NOT EX POST FACTO.

It is both impossible and unnecessary to sustain eac
the elements of this crime as a crime in itself. As wa
aptly stated by the N. J. Supreme Court in this case:

> "But the statute is not aimed at punishing convi
> criminals because they are convicted criminals, but
> cause, being such, they become members of a gang
> ganized to plot and commit further crimes, and neg
> or refuse to engage in any lawful occupation.
> act is therefore predicated on two present and vo
> tary acts of the party, both of which must con
> voluntary membership in a gang; and voluntary abs
> tion from work. We see no *ex post facto* legisla
> here." (*State* v. *Pius*, 118 N. J. L. 212.)

Appellants were not tried for the crimes of wh
they had previously been convicted, nor were they t
upon the same set of facts. Indeed, the circumstance
the crimes leading to their former convictions were no
particular moment in this case. Under these conditi
there can be no claim of double jeopardy.

Appellants were not tried for any act done before the effective date of the statute in question. If they had severed their connection with the gang before or immediately upon the adoption of the act, it is conceded that any attempt to prosecute them would have been illegal. Since they did not relinquish their membership in the gang, it is conceivable that a valid indictment could have been returned against them for each day such membership continued, from the effective date of the act until the meeting of the grand inquest.

The prior convictions of defendants do not constitute the crime for which they were tried in this case but only a status forming one of the elements of that crime.

In *Murphy* v. *Ramsey*, 114 U. S. 15, 5 S. C. R. 747, it was held:

> "The disfranchisement, under the Act of March 22, 1882, (22 Stat. L. 30, C. 47, U. S. Ct. 48, Sec. 1461), Section 8, of a man who, having contracted a bigamous or polygamous marriage and become the husband at one time of two or more wives, maintains that relation and status at the time when he offers himself to be registered as a voter, is not *ex post facto*, although, since the passage of that act he may not have cohabited with more than one woman. The disfranchisement operates upon the existing state and condition of the person, and not upon the past events."

The act is not ex post facto, because:

In general, an ex post facto law is a law enacted after an offense has been committed, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage. The term embraces every law that makes an act done before the passage of the law, and innocent when done, criminal; every law that aggravates a crime or charges the punishment and inflicts a greater punishment than the law annexed to the crime when committed; every

law that alters the legal rules of evidence, and authorizes conviction upon less or different testimony that was required by the law at the times the offense was committed.

Malloy v. *South Carolina*, 237 U. S., 180;
Gibson v. *Mississippi*, 162 U. S., 589;
Duncan v. *Missouri*, 152 U. S. 382;
Burgess v. *Salmon*, 97 U. S. 382;
Thompson v. *Utah*, 170 U. S. 351;
Kring v. *Missouri*, 107 U. S. 235.

The appellants contend that their individual acts of crime were committed before the enactment of the "Gangster Act"; therefore their conviction now is for past acts, now made criminal under our statute.

The appellants fail to interpret the act. Their argument lies on the thought of just one element of the crime—prior conviction. They state that their convictions were before the effective date of the statute, therefor ex post facto.

The statute is made of several elements. (1) Defendant must have been convicted at least three times of being a disorderly person, or convicted of a crime in this or any other State.

(2) Must not be engaged in any lawful occupation.

(3) Must be a member of a gang consisting of two or more persons.

Thus we see that prior conviction is merely an element of a crime, which element by itself would not bring the defendants within this statute. On the other hand, it is this prior conviction element, coupled with two others, namely, association together, and failure to have a lawful occupation which is punishable.

As long as the defendants associated themselves as members of the gang during the running of the statute, they were guilty of the offense described, and continued to

violate said statute each day that they voluntarily associated. It was a new and separate offense each day of association.

Thus we see that the statute was not ex post facto because a new offense was committed each day that the defendants voluntarily associated themselves as members of a gang, each defendant on his own part having fulfilled all requisite elements of the crime made punishable by statute.

We respectfully submit that this Court should dismiss the appeal of appellants.

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HERBERT F. CAMPBELL,
Assistant Prosecutor of Pleas,
Attorney for the State of
New Jersey.

ROBERT PEACOCK,
Assistant Attorney General
of New Jersey.
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 308.—October Term, 1938.

Ignatius Lanzetta, Michael Falcone and Louie Del Rossi, Appellants, *vs.* The State of New Jersey.

Appeal from the Court of Errors and Appeals of the State of New Jersey.

[March 27, 1939.]

Mr. Justice Butler delivered the opinion of the Court.

By this appeal we are called on to decide whether, by reason of vagueness and uncertainty, a recent enactment of New Jersey, § 4, c. 155, Laws 1934, is repugnant to the due process clause of the Fourteenth Amendment. It as as follows: "Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State, is declared to be a gangster . . . ".[1] Every violation is punishable by fine not exceeding $10,000 or imprisonment not exceeding 20 years, or both. § 5.

In the court of quarter sessions of Cape May County, appellants were accused of violating the quoted clause. The indictment charges that on four days, June 12, 16, 19, and 24, 1936 "they, and each of them, not being engaged in any lawful occupation; they, and all of them, known to be members of a gang, consisting of two or more persons, and they, and each of them, having been convicted of a crime in the State of Pennsylvania, are hereby declared to be gangsters." There was a trial, verdict of guilty, and judgment of conviction on which each was sentenced to be imprisoned in the state prison for not more than ten years and not less than five years, at hard labor. On the authority of its recent decision in *State v. Bell*, 15 N. J. L. Misc. 109, the supreme court entered judgment affirming the conviction. 118 N. J. L. 212. The court of errors and appeals affirmed, 120 N. J. L. 189, on the authority of its decision, *State v. Gaynor*, 119 N. J. L. 582, affirming *State v. Bell*.

[1] The section continues: "provided, however, that nothing in this section contained shall in any wise be construed to include any participant or sympathizer in any labor dispute." The proviso is not here involved.

If on its face the challenged provision is repugnant to the d process clause, specification of details of the offense intended to charged would not serve to validate it. Cf. *United States* v. *Re* 92 U. S. 214, 221; *Czarra* v. *Board of Medical Supervisors*, 25 A D. C. 443, 453. It is the statute, not the accusation under it, t prescribes the rule to govern conduct and warns against transgr sion. See *Stromberg* v. *California*, 283 U. S. 359, 368; *Lovell Griffin*, 303 U. S. 444. No one may be required at peril of li liberty or property to speculate as to the meaning of penal st utes. All are entitled to be informed as to what the State co mands or forbids.[2] The applicable rule is stated in *Connally General Const. Co.*, 269 U. S. 385, 391: "That the terms of a pe statute creating a new offense must be sufficiently explicit to i form those who are subject to it what conduct on their part w render them liable to its penalties, is a well-recognized requiremen consonant alike with ordinary notions of fair play and the settl rules of law. And a statute which either forbids or requires t doing of an act in terms so vague that men of common intelligen must necessarily guess at its meaning and differ as to its applic tion, violates the first essential of due process of law."

The phrase "consisting of two or more persons" is all that pu ports to define "gang". The meanings of that word indicated dictionaries and in historical and sociological writings are num ous and varied.[3] Nor is the meaning derivable from the comm

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[2] Champlin Rfg. Co. v. Commission, 286 U. S. 210, 242, 243. Cline v. Fri Dairy Co., 274 U. S. 445, 458. Connally v. General Const. Co., 269 U. S. 3 391-393. Small Co. v. Am. Sugar Ref. Co., 267 U. S. 233, 239. United Sta v. Cohen Grocery Co., 255 U. S. 81, 89-92. Collins v. Kentucky, 234 U. S. 6 638. International Harvester Co. v. Kentucky, 234 U. S. 216, 221-223. People v. Belcastro, 356 Ill. 144. People v. Licavoli, 264 Mich. 643.

[3] American dictionaries define the word as follows:

Webster's New International Dictionary (2d ed.): "gang . . . A manner, or means of going; passage, course, or journey . . . A set or f complement of any articles; an outfit. A number going in or forming a co pany; as, a gang of sailors; a gang of elk. Specif.: . . . A group persons associated under the same direction; as a gang of pavers; a gang slaves . . . A company of persons acting together for some purpo usually criminal, or at least not good or respectable; as, a political gang gang of roughs. . . ."

Funk & Wagnalls New Standard Dictionary (1915): "gang . . . company or band of persons, or sometimes of animals, going or acting togethe a group or squad: sometimes implying cooperation for evil or disreputab purposes; as, a gang of laborers; a gang of burglars; he set the whole ga at work. . . ."

Century Dictionary and Cyclopedia (1902): "gang . . . A numb going or acting in company, whether of persons or of animals: as, a ga

law,[4] for neither in that field nor anywhere in the language of the law is there definition of the word. Our attention has not been called to, and we are unable to find, any other statute attempting to make it criminal to be a member of a "gang."[5]

In *State* v. *Gaynor, supra,* the court of errors and appeals dealt with the word. It said: "Public policy ordains that a combination designed to wage war upon society shall be dispersed and its members rendered incapable of harm. This is the objective of section 4 . . . and it is therefore a valid exercise of the legislative power. . . . The evident aim of this provision was to render penal the association of criminals for the pursuit of criminal enterprises; that is the gist of the legislative expression. It cannot be gainsaid that such was within the competency of the legislature; the mere statement of the purpose carries justification of the act. . . . If society cannot impose such taint of illegality upon the confederation of convicted criminals, who have no lawful occupation, under circumstances denoting . . . the pursuit of criminal objectives, it is helpless against one of the most menacing

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of drovers; a gang of elks. Specifically—(a) A number of persons associated for a particular purpose or on a particular occasion: used especially in a depreciatory or contemptuous sense or of disreputable persons: as, a gang of thieves; a chain-gang . . . (b) A number of workmen or laborers of any kind engaged on any piece of work under supervision of one person; a squad: more particularly, a shift of men; a set of laborers working together during the same hours. . . ."

Part of the text of the definitions given by the Oxford English Dictionary (1933) reads: "gang . . . A set of things or persons . . . A company of workmen . . . A company of slaves or prisoners . . . Any band or company of persons who go about together or act in concert (chiefly in a bad or depreciatory sense, and in mod. usage mainly associated with criminal societies) . . . To be of a gang: to belong to the same society, to have the same interests. . . ."

Another English dictionary, Wyld's Universal Dictionary of the English Language, defines the word as follows: "gang . . . 1. A band, group, squad; (a) of labourers working together; (b) of slaves, prisoners &c. 2. (in bad sense) (a) A group of persons organized for evil or criminal purpose: a gang of burglars &c; (b) (colloq., in disparagement) a body, party, group, of persons: "I am sick of the whole gang of university wire-pullers. . . ."

See: Asbury, Herbert, *The Gangs of New York,* 1927, Alfred A. Knopf. Thrasher, Frederic M., "Gangs" in Encyclopaedia of the Social Sciences, 1931, vol. 6, p. 564, and *The Gang: A Study of 1313 Gangs in Chicago,* 1927, University of Chicago Press.

[4] See, e.g., Champlin Rfg. Co. v. Commission, 286 U. S. 210, 242-243. Connally v. General Const. Co., 269 U. S. 385, 391. Nash v. United States, 229 U. S. 373.

[5] Cf. Kans. Laws 1935, c. 161. Ill. Laws 1933, p. 489, held unconstitutional in People v. Belcastro, 356 Ill. 144. Mich. Comp. Laws (Mason, Supp. 1935) § 17115-167, held unconstitutional in People v. Licavoli, 264 Mich. 643.

forms of evil activity. . . . The primary function of gov ment . . . is to render security to its subjects. And any a chief menacing that security demands a remedy commensurate w the evil."

Then undertaking to find the meaning of "gang" as used in t challenged enactment, the opinion states: "In the construction of t provision, the word is to be given a meaning consistent with the g eral object of the statute. In its original sense it signifies actio 'to go'; in its modern usage, without qualification, it denotes common intent and understanding—criminal action. It is defi as 'a company of persons acting together for some purpose, usu criminal,' while the term 'gangster' is defined as 'a member o gang of roughs, hireling criminals, thieves, or the like.' Webst New International Dictionary (2d ed.). And the Oxford Eng Dictionary likewise defines the word 'gang' as 'any company persons who go about together or act in concert [in modern mainly for criminal purposes].' Such is plainly the legisla sense of the term."

If worded in accordance with the court's explication, the c lenged provision would read as follows: "Any person not enga in any lawful occupation, known to be a member of any gang sisting of two or more persons (meaning a company of per acting together for some purpose, usually criminal, or a comp of persons who go about together or who act in concert, ma for criminal purposes), who has been convicted at least three ti of being a disorderly person or who has been convicted of any cr in this or in any other State, is declared to be a gangster (mean a member of a gang of roughs, hireling criminals, thieves, or like)."

Appellants were convicted before the opinion in *State* v. *Gay* It would be hard to hold that, in advance of judicial u ance upon the subject, they were bound to understand the c lenged provision according to the language later used by court. Indeed the state supreme court (*State* v. *Bell*, *sup* went on supposed analogy between "gang" and offenses nounced by the Disorderly Persons Act, Comp. Stat. Supp. 1 § 59-1 upheld by the court of errors and appeals in *Levine* v. *St* 110 N. J. L. 467, 470. But the court in that case found the m ing of "common burglar" there involved to be derivable from common law.

The descriptions and illustrations used by the court to indicate the meaning of "gang" are not sufficient to constitute definition, inclusive or exclusive. The court's opinion was framed to apply the statute to the offenders and accusation in the case then under consideration; it does not purport to give any interpretation generally applicable. The state court did not find, and we cannot, that "gang" has ever been limited in meaning to a group having purpose to commit any particular offense or class of crimes, or that it has not quite frequently been used in reference to groups of two or more persons not to be suspected of criminality or of anything that is unlawful. The dictionary definitions adopted by the state court extend to persons acting together for some purpose, "usually criminal", or "mainly for criminal purposes". So defined, the purposes of those constituting some gangs may be commendable, as, for example, groups of workers engaged under leadership in any lawful undertaking. The statute does not declare every member to be a "gangster" or punishable as such. Under it, no member is a gangster or offender unless convicted of being a disorderly person or of crime as specified. It cannot be said that the court intended to give "gangster" a meaning broad enough to include anyone who had not been so convicted or to limit its meaning to the field covered by the words that it found in a dictionary, "roughs, hirelings criminals, thieves, or the like". The latter interpretation would include some obviously not within the statute and would exclude some plainly covered by it.

The lack of certainty of the challenged provision is not limited to the word "gang" or to its dependent "gangster". Without resolving the serious doubts arising from the generality of the language, we assume that the clause "any person not engaged in any lawful occupation" is sufficient to identify a class to which must belong all capable of becoming gangsters within the terms of the provision. The enactment employs the expression, "known to be a member". It is ambiguous. There immediately arises the doubt whether actual or putative association is meant. If actual membership is required, that status must be established as a fact, and the word "known" would be without significance. If reputed membership is enough, there is uncertainty whether that reputation must be general or extend only to some persons. And the statute fails to indicate what constitutes membership or how one may join a "gang".

The challenged provision condemns no act or omission; the te
it employs to indicate what it purports to denounce are so va
indefinite and uncertain that it must be condemned as repugnan
the due process clause of the Fourteenth Amendment.

Reversed

Mr. Justice FRANKFURTER took no part in the consideration
decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S